

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 10,737

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY LERMAN, MYER LERMAN and SAMUEL LERMAN,
Co-partners trading as LERMAN BROTHERS, *Appellants*,

VS.

FRUIT PROCESSORS, INC., a corporation, *Appellee*

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Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

For the

District of Columbia Circuit

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APPELLANTS' QUESTIONS PRESENTED

1. May a fruit packer lawfully demand payment for frozen fruit tendered to a dealer in partial satisfaction of an order before there has been any opportunity to inspect the merchandise?

2. Where a packer has stored frozen fruit allegedly packed to satisfy a dealer's order, in a warehouse at a shipping point not specified in the order, may he lawfully draw sight drafts on the dealer for shipments to the warehouse?

3. Where a packer draws three sight drafts on a dealer for three shipments to a storage warehouse which were not made, may he support a claim that payment was wrongfully refused by proof that a nearly equivalent total amount of merchandise was received by the warehouse for the packer's account in five shipments on other dates?

4. May the packer recover from the dealer the difference between the total amount of the unpaid drafts and the net proceeds of later sales of an equivalent amount of the stored merchandise to others, when the dealer has been denied any inspection of the merchandise and has never received any acknowledgment from the warehouse that it holds any merchandise for the dealer's account?

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**Appeal from the United States District Court
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APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the District Court enforcing a reparation order entered by the Secretary of Agriculture. Jurisdiction was granted to the District Court by Section 7 of the Perishable Agricultural Commodities Act (7 U. S. C., § 499g). Jurisdiction of the appeal is granted to this Court by Section ~~1200~~, Title 28, U. S. Code. 1291

STATEMENT OF THE CASE

The judgment below was for \$18,293.07 representing damages, interest and attorneys' fees awarded to Fruit Processors, Inc., a Michigan fruit packer, for an alleged violation of Section 2 of the Perishable Agricultural Commodities Act by Lerman Brothers, District of Columbia wholesale food dealers. Lerman Brothers petitioned the District Court to set aside the Secretary of Agriculture's award. The statute provided for a trial de novo, with the Secretary's findings taken as prima facie evidence of the facts therein stated (7 U. S. C., § 499g).

Appellee, Fruit Processors, Inc., was awarded damages by the Secretary upon the theory that appellants had refused "without reasonable cause" to pay for frozen raspberries, in violation of a written contract. The Secretary erroneously found that appellants had received and paid for one shipment under the contract, and had received but not paid for three other shipments. At the trial appellee submitted its case on the Secretary's findings (App. 59). Appellants then showed that the accepted shipment was made under a different written contract, and that the shipments and contract on which the award was based were never made. The following statement of facts assumes that all evidentiary conflicts were properly resolved below against appellants.

The Facts

Harry Lerman asked W. J. A. Dietrich, a Baltimore broker, to find for appellants frozen cherries and raspberries with which to fill orders received from grocers in Washington, D. C. Dietrich's salesman, David Beasley, telephoned Lerman from appellee's plant at St. Joseph, Michigan that it could supply these products, and outlined in this conversation the terms of a proposed sale (App. 93-95). Beasley then reported the conversation to Dietrich, who confirmed the resulting orders (App.

95) by three separate sales memoranda (Exs. 1, App. 142; 2, App. 143 and 4), copies of which were sent to appellants and to appellee (App. 120). These orders were "subject to confirmation of seller" and admonished the parties to "advise immediately" if the terms were incorrect (App. 142).

Exhibit 1 (App. 142), dated July 5, 1946, recites a sale "F. O. B., Michigan" of 1,500 cases containing 12 two-pound boxes each (36,000 pounds), at forty cents a pound and 1,500 cases containing 24 one-pound boxes each (36,000 pounds), "S. A. P.", which means price subject to buyer's approval (App. 82). The raspberries allegedly sold under this contract were not shipped to appellants but were sent to Swift & Company at Chicago for cold storage (App. 61).

Appellee did not ship the amounts ordered. Instead, it packed and shipped by truck, 542 cases, each containing 16 two-pound boxes (17,344 pounds), on July 9, 1946 (App. 63), 579 similar cases (18,528 pounds) on July 10 (App. 63) 154 similar cases (4,928 pounds) on July 11 (App. 64). On July 16 and 17, it packed and shipped by truck 380 cases (9,120 pounds) and 338 cases (8,112 pounds), respectively, of the raspberries in one-pound boxes (App. 64). The Swift warehouse at Chicago received the merchandise on those dates "for the account of Fruit Processors, Inc.", (App. 24-26).

Appellee tried to collect from appellants for the shipments made to Chicago on July 9, 10, 11, 16 and 17 by sending three sight drafts to appellants' Washington bank on July 10, 12 and 25, 1946 (App. 35, 36). These drafts did not conform to the order as to price¹, terms of ship-

¹ Appellee billed the two-pound boxes at thirty-nine cents a pound instead of the forty cent price stated in the contract, as "a concession" (App. 84). The one-pound boxes, sold "S.A.P." in the contract, were billed at forty cents a pound.

ment or quantity. None of the three drafts corresponded in date or amount to any of the five shipments made to the warehouse. The differences between the order, drafts and shipments are summarized in the following table:

	ORDER	DRAFTS	SHIPMENTS
<i>Date</i>	July 5, 1946	July 10, 12, 25, 1946	July 10, 11, 12, 16 & 17, 1946
<i>Shipping Terms</i>	FOB, Mich.	FOB, Chicago	By truck from Michigan to Chicago at appellee's expense.
<i>Delivery Point</i>	Wash., D. C.	Chicago Warehouse	Chicago Warehouse
<i>Quantity</i>			
Two-pound bxs.		July 10, 34,784 lbs. July 12, 6,048 lbs.	July 9, 17,344 lbs. July 10, 18,528 lbs. July 11, 4,928 lbs.
	36,000 lbs.	Total 40,832 lbs.	Total 40,800 lbs.
One-pound bxs.			July 16, 9,120 lbs. July 17, 8,112 lbs.
	36,000 lbs.	July 25, 17,232 lbs.	Total 17,232 lbs.
<i>Price</i>			
Two-pound bxs.		July 10, \$13,565.76 July 12, 2,358.72	
	\$14,400	\$15,914.48	
One-pound bxs.	"S.A.P."	July 25, \$ 6,892.80	

The drafts were the only notice the appellee sent to appellants that this merchandise had been sent to Chicago (App. 68). The last of them did not reach appellants until about July 28 (App. 102). On about August 1, 1946, appellants advised Dietrich that they desired an inspection of the stored raspberries (App. 116). Dietrich took the position that appellants were entitled to no inspection (App. 108), but passed along the request to appellee (App. 116). On August 5 (App. 130), Lerman

wired a request for inspection to the Department of Agriculture at Chicago (App. 145). On August 7, 1946, appellee telegraphed appellants demanding payment of the drafts, refusing the requested inspection and advising appellants that if they were not paid on August 8, 1946 appellee would "sell the merchandise at the best price possible *at this time* and hold you responsible for any and all loss" (App. 144, 145, emphasis supplied).

The drafts were then returned unpaid, but appellee held the merchandise instead of selling it. It was offered about August 10 or 11, 1946 (App. 73) at forty cents a pound, on the basis of samples from the pack, with no takers (App. 80). The market price was then around thirty-eight to forty cents a pound (App. 111). Subsequently, the market declined (App. 112). The only sales made before March, 1947 were on November 12 and 13, 1946, when 2,400 and 338-pound lots were sold at thirty-eight and thirty-nine cents a pound, respectively (App. 14-15).

On January 30, 1947, appellee's Michigan attorney wrote appellants that appellee "*now proposes* to dispose of this special pack of raspberries for the best price obtainable" unless appellants accepted and paid for it (App. 38. Emphasis supplied). The letter fixed February 10, 1947 as a new date for acceptance and February 15, 1947 as the date on which new drafts, issued in the same amount as the July, 1946 drafts, would have to be taken up. No samples or inspection of the merchandise were offered. No mention was made of the prior sales or the telegram of August 7, 1946, which had said the raspberries would be sold at that time.

The remainder of this pack was then sold to various buyers between March 6, 1947 and August 5, 1947 in various lots for an average price of less than sixteen cents a pound (App. 42). The price descended from thirty-

three cents a pound on March 6 (App. 16) to fifteen cents a pound on August 5 (App. 20). Appellee offered no proof as to the quality or condition of this merchandise when sold, or at any other time. Its manager was permitted to testify that there was no demand for raspberries packed in one and two-pound boxes (App. 79), but appellants' offer to show that they had orders which would have enabled them to market this merchandise if the requested inspection proved it to be of merchantable quality was rejected (App. 126).

Other lots of frozen raspberries in two-pound boxes, packed by appellee and stored for its account in the Swift warehouse, were sold to other customers², and were, to some extent, intermingled at the Swift warehouse. Four thousand pounds of raspberries in warehouse lot, Number 1521, allegedly packed for Lerman, were "inadvertently" delivered to W. T. Smith & Co. of Springfield, Ohio on February 28, 1947 (App. 27)³, but the invoice for the Smith sale was not offered and the price paid by Smith is undisclosed. The last prior sale was at thirty-nine cents a pound (App. 15), and the first subsequent sale was at thirty-three cents a pound (App. 16). Instead of crediting appellants with the proceeds of the Smith sale, appellee charged them with 4,000 pounds from Smith's

² The copies of warehouse receipts in evidence state that all items other than those relating to the merchandise in suit, ^{are} omitted from these copies.

³ From appellee's statement of warehouse charges (App. 32-34) it also appears that the merchandise received under this lot number on July 11, 1946 had already been replaced by other merchandise. The warehouse receipts issued for lots #1511, 1518 and 1521 are numbered 7062, 7066 and 7068, respectively (App. 32). These receipts were replaced by a new receipt, numbered 7462, in October, 1946, for an equivalent amount of merchandise (App. 32). Receipt number 7072, issued for lots #1545 and 1546 (App. 32), was also replaced by number 9310, issued in March, 1947, for an equivalent amount of merchandise (App. 33).

lot, Number 1524 (App. 31), which appellee sold to National Syrup Products Co. at fifteen cents a pound on August 5, 1947 (App. 20).

The two-pound cartons were supplied by appellee (App. 117) but appellants furnished 40,000 one-pound cartons, of which only 17,232 were used to pack raspberries for them (App. 88). The rest were sold by appellee for an undisclosed price (App. 88). Their approximate value, as estimated by appellee's manager, was twenty-four dollars per thousand (App. 88). It appeared on examination of appellee's manager by appellants' counsel that appellee had calculated an actual net recovery on these cartons of \$632.62⁴, which was not shown on the recap of the net loss attached to the complaint (App. 89), although appellee had made the calculation at that time (App. 88).

Appellee's formal complaint charging appellants with a violation of Section 2 of the Perishable Commodities Act was filed eighteen months after the alleged sale and was not served until March 10, 1948 (App. 39). Although appellants had previously denied liability in a letter to the Secretary, they failed to file a formal answer (App. 45). They were, therefore, found in default for want of an answer and the Secretary made ex parte findings against the appellants in the terms of the complaint, which misrepresented or concealed the relevant facts in the following manner:

The sworn complaint, dated January 5, 1948, falsely alleged a single written contract, "F. O. B., Chicago", covering both the raspberries in thirty-pound tins and

⁴The amount was apparently arrived at by deducting from \$960.00, the value of the 40,000 cartons, \$179.18 for cartons that were scrapped (~~Tr. 101-102~~) and \$148.20 for freight (~~Tr. 102~~).

App. 88, 89

App. 89

those in one and two-pound containers⁵ (App. 6); correctly alleged an acceptance of and payment for those in thirty-pound tins (App. 7, 8); falsely alleged a delivery of the other raspberries to appellants by three shipments to the Chicago warehouse for their account on July 10, 12 and 25, 1946⁶ (App. 8) and correctly alleged a refusal to pay for them.

The total contract price was falsely alleged to be \$31,140.00, F. O. B., Chicago (App. 6) and the total amount of the three unpaid sight drafts dated July 10, 12 and 25 (\$22,817.28) was falsely alleged to be the unpaid balance due. Deduction from that balance of the net proceeds from the open market sales was falsely alleged to result in a net damage of \$14,610.55, on which interest was claimed from "the date of demand to date of payment" (App. 10).

The Secretary awarded appellee \$14,610.55 with interest at 5% from August 1, 1946 (App. 43). Nothing was alleged or found with respect to appellants' request for an inspection.

A copy of the Secretary's order was sent to appellants on July 7, 1948 with a notice that their license to do business would be automatically suspended on August 12, 1948, as provided in the Act, unless the award was paid or an appeal taken (App. 43). Appellants then engaged counsel and petitioned the Secretary to set aside the

⁵ The copy of the alleged contract attached to the complaint, (App. 3) erroneously shows the order for thirty-pound tins (Ex. 2, App. 143) and the order for one and two-pound boxes (Ex. 1, App. 142) on a single sales memorandum.

⁶ The copies of the warehouse receipts attached to the complaint (App. 24-28) show on their face that they do not correspond with the sight drafts and that the merchandise was received for appellee's account, but the complaint alleges and the Secretary found that shipments were made and received on July 10, 12 and 25 for appellants' account (App. 8, 41).

award and hear them on the merits. Their petition was denied August 19, 1948 on the ground that the delay of four months between the last date for answer and the filing of the petition was unreasonable (App. 46). Their petition was, however, accepted as adequate to suspend the order until a petition for review could be filed in the District Court (App. 46), which was done on September 17, 1948 (App. 2). The trial was had on May 1, 2 and 3, 1950, at the conclusion of which a judgment was entered which confirmed the Secretary's award, after deducting the carton allowance of \$632.62, which had not been disclosed to the Secretary (App. 53). A sixteen hundred and fifty dollar attorney fee was also allowed to appellee as provided in the Act (App. 54).

The case was decided without benefit of briefs and no written opinion was filed. The District Court adopted as its own each of the findings made by the Secretary without change (App. 50). It also found that appellants had no right of inspection under the contract (App. 53), that if they ever had a right of inspection, they had waived it by an unreasonable delay in requesting it (App. 53), and that the request for inspection was made in bad faith (App. 53).

The Statutes Involved

Set out below are the applicable provisions of the Perishable Agricultural Commodities Act of 1930.

Section 2, as amended, 7 U. S. C. 499b reads as follows:

"Unfair conduct; what constitutes

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

"(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural com-

modity received, bought, sold, shipped, or handled in interstate or foreign commerce;

“(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

“(3) For any commission merchant to discard, dump, or destroy without reasonable cause any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce;

“(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

“(5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to misrepresent by word, act, mark, stencil, label, statement, or deed the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State or country of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. As amended June 29, 1940, c. 456, §§ 3, 4, 54 Stat. 696; Apr. 6, 1942, c. 211, 56 Stat. 200;

“(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such

card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced;

“(7) For any commission merchant, dealer, or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce. June 10, 1930, c. 436, § 2, 46 Stat. 532; Apr. 13, 1934, c. 120, §§ 2, 3, 48 Stat. 585; June 19, 1936, c. 602, § 1, 49 Stat. 1533; Aug. 20, 1937, c. 719, §§ 2-4, 50 Stat. 725, 726.”

That part of Section 2 (c), as amended, 7 U. S. C., 499g (c), which describes the character of the proceeding below, reads as follows:

“Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court; As amended May 14, 1940, c. 196, 54 Stat. 214.”

The provisions of the Uniform Sales Act, which would apply if the appellee had made the contract and deliveries alleged in its complaint appear in the argument under Point II.

STATEMENT OF POINTS RELIED ON

1. The parties did not make the contract on which the award is based.
2. Appellee did not make the deliveries on which the award is based.
3. Even if the contract and deliveries erroneously found below had been made, appellants would have had a legal right to inspect the merchandise before paying the drafts.
4. Appellee's refusal of the requested inspection concealed material facts concerning its claim and was unauthorized by any contract, statute or regulation.

SUMMARY OF ARGUMENT

1. Appellee obtained its award by false allegations with respect to the alleged contract and deliveries and by concealing appellants' request for inspection from the Secretary. The Secretary's findings of fact were sustained below only because the District Court failed to notice the conflict between these findings and the undisputed evidence. The appellants' order was for a carload of frozen raspberries in two-pound boxes at forty cents a pound and a carload of one-pound boxes, at an unspecified price, to be approved by appellants before payment, all to be shipped to appellants at Washington, D. C., "F. O. B., Michigan". Appellee never made such shipments to appellants. Instead, it shipped merchandise to a Chicago warehouse for its own account. Subsequently, it claimed that more than a carload of two-pound boxes and less than half a carload of one-pound boxes in the warehouse were held for Lerman Brothers' account. It claimed that these shipments were made on July 10, 12 and 25. This was not true. On the contrary, the appellee

attempted to support the claim by showing shipments of five installments on July 9, 10, 11, 16 and 17, 1946. The sight drafts of July 10, 12 and 25, 1946, on which the claim was based, were unauthorized by appellants and the shipments, supposedly represented by the drafts, were in fact never made. The Secretary and the District Court both erred in concluding (1) that appellee had made a contract containing the terms appellee alleged it to contain; (2) that appellee ever made the deliveries it alleged it had made; and (3) that appellee was entitled to recover from appellants the difference between the amount of the sight drafts and the proceeds of the sales made to others in 1947.

2. Even if the findings below were factually correct, there would still be no violation of the Perishable Agricultural Commodities Act by appellants. Under the contract as alleged and found, appellants had a legal right to inspect the merchandise before paying for it. Had the inspection issue been presented to the Secretary, he would have been bound to resolve it in appellants' favor under his own regulations and the provisions of the Uniform Sales Act. The District Court's conclusion that there was no such right, has no basis in law or administrative regulations. The regulation relied upon by the Court to establish a waiver of the inspection right has no application to appellee's shipments.

There is no evidence to support the Court's finding of bad faith in the inspection request. The requested inspection could only have damaged appellee if the merchandise was not as represented. The inspection was refused because it would have laid bare in August, 1946 the fact that there was no delivery in accordance with the July, 1946 sight drafts of merchandise which would have satisfied appellants' order. The misleading allegations of appellee's 1948 complaint were an effort to use the Perishable Agricultural Commodities Act to insure

it against an inferior 1946 pack and a declining market. The Act was intended to prevent fraud rather than to reward it, and there was no violation by appellants under any theory.

ARGUMENT

I. Appellee Never Made the Contract or Deliveries on Which the Award is Based.

The judgment below rests upon findings of fact which have no evidentiary support. While the Court below erred, as a matter of law, in its conclusion as to appellants' right of inspection, its basic error was an uncritical acceptance of the Secretary's findings of fact. Since the trial below was *de novo*, with the Secretary's findings to be taken only as *prima facie* evidence of the facts stated, the District Court was bound to determine the extent to which the Secretary's findings were supported or contradicted by evidence.

The evidence cited in our statement of the case is not contradicted by any other evidence. This Court may assume, for the purpose of this appeal, that any evidentiary conflicts were properly resolved against appellants. The uncontradicted evidence shows that the decisive factual findings of the Secretary are rested on false allegations in the appellee's complaint.

Appellee secured its award by alleging a contract and deliveries it never made. Its complaint alleged a contract in writing for the sale of 36,000 pounds of frozen raspberries in one pound containers at 40¢ a pound, 36,000 pounds in two pound containers at 39¢ a pound, and 600 thirty pound tins (18,000 pounds), at 35¢ a pound, F. O. B. Chicago. (App. 6). The evidence shows that no such contract was made. On the contrary, the written order of July 5, 1946, for a carload (36,000 pounds) of one-

pound boxes, and a carload of two-pound boxes specified a sale "F. O. B., Michigan", for delivery to appellants at Washington, D. C. (App. 142) Appellee never placed this merchandise on board a carrier for shipment to appellants at any destination. Instead, it made miscellaneous truck shipments totalling more than a carload of two-pound boxes and less than half a carload of one-pound boxes to a cold storage warehouse at Chicago for its own account. The order gave appellee no authority to bill appellants for any of those shipments at any price. When appellee sent the sight drafts of July 10, 12, and 25 to appellants' Washington bank, it was, in effect, tendering appellants new contracts for different quantities at different prices with a different delivery point. These contracts were rejected when appellants refused to pay the drafts.

Appellants accepted and paid for the raspberries in thirty-pound tins under a separate contract (Exhibit 2) which expressly provided for shipment from a Chicago warehouse (App. 143). They were only informed of the shipments of one and two-pound boxes, allegedly made to the Chicago warehouse for their account, by the three sight drafts which were mailed from Michigan on July 10, 12 and 25, respectively. There were no shipments in accordance with the drafts. The inspection requested by appellants would certainly have disclosed the absence of such shipments, and might also have disclosed that the stored merchandise was not of merchantable quality when tendered to appellants. But, since appellee's final draft was not sent until eight days after the final shipment allegedly made for appellants' account, appellants were given no opportunity to inspect the merchandise on arrival at the warehouse.

Appellants requested an inspection because they could have resold the warehoused merchandise if it proved to be of merchantable quality. The court's finding of bad

faith in the inspection request has no support in the evidence received and would have been refuted by the excluded evidence that appellant actually had to procure raspberries of the same kind from another source in order to fill an order (App. 126). The requested inspection was at the warehouse where appellee had stored the merchandise for its own convenience (App. 68) and was to be made at appellants' expense by government inspectors whose certificate would have been evidence of the quality and condition of the merchandise. 7 U. S. C. A., Sec. 499 n(a). Appellee could only have been hurt by the inspection if the merchandise proved to be in poor condition or inferior in quality.

The refusal of inspection takes on added significance in the light of appellee's subsequent handling of the unclaimed merchandise. The delivery to another purchaser of some of the merchandise allegedly packed and stored for appellants' account shows that appellee packed and stored frozen raspberries for others. It appears on the face of the copies of the warehouse receipts in evidence that these copies show only that part of the total shipments evidenced by these receipts that appellee now claims was packed for appellants (App. ~~32-34~~²⁴⁻²⁹). The computation of the storage charges also shows that these are not the receipts under which the merchandise allegedly stored for appellants was being held when it was finally liquidated (App. 34).

These shipments were, according to the terms of the receipts in evidence, received and held for the account of appellee alone (App. 24-29). Appellee regularly shipped to the warehouse because it had inadequate cold storage facilities at the plant (App. 68). It was free to allocate the merchandise in the warehouse among its various customers as it saw fit. What was finally allocated to appellants, in attempted support of appellee's complaint, proved in fact to be unsalable to consumers

in the original packaged form. In March, 1947, it was being offered for the manufacture of jam (App. 87) and the final sale in August, 1947, of 42,147 pounds to the National Syrup Products Company at fifteen cents a pound was apparently a sale for manufacturing purposes (App. 20).

Whether the inability to sell this food for retail consumption in August, 1947, was due to a depressed market, a poor grade of raspberries, faulty packing, damage in transit to the warehouse, or failure to maintain proper storage temperature' is immaterial here. Both the sale allegedly made to appellants and the subsequent sales to others, allegedly made for appellants' account, are unsupported by any contemporaneous notice that the particular warehouse lots involved were being held or sold for appellants' account. The three sight drafts sent to appellants' bank did not specify, or correspond to any of these five lots. They were accompanied only by warehouse transfer orders which would presumably have entitled appellants to withdraw the specified amounts from storage if and when they paid the drafts (App. 70-71). Such transfer orders, of course, do not evidence receipt by the warehouse from the shipper of the specified merchandise.

In short, the contract on which the award is based was never made, nor was the merchandise represented by the rejected sight drafts ever delivered to appellants. The finding of a breach of contract by non-payment of the drafts therefore has no factual support. There was in no event any basis for claiming in 1948 that the warehoused

' In this connection, it is interesting to note that, although the merchandise was received by its Freezer Storage Department, the warehouse receipts state that Swift & Company assumed no responsibility for "loss or damage resulting from temperature changes, or other causes incident to general storage." (App. 24, par. 2).

merchandise sold to others in 1947 was sold for appellants' account.

II. Appellants Did Not Violate the Act.

Appellee was awarded as damages for an alleged breach of contract in violation of the Perishable Agricultural Commodities Act the difference between the alleged contract price and the proceeds of sales of similar merchandise at distress prices. The market price at the time of the alleged breach was substantially the same as the alleged contract price (See p. 5, *supra*). The merchandise now charged to appellants was not sold at that time because appellee wanted a higher price than this merchandise and the market then warranted. Its failure to sell at the best price then obtainable resulted from no act of appellants.

The claim that appellants had already accepted a part of the order, which was made in the complaint to the Secretary, was not made in the appellee's letter to appellants of January 30, 1947 (App. 38). The complaint to the Secretary in 1948 was a belated effort to transfer liability to appellants for the remnants of an inferior pack. The Perishable Agricultural Commodities Act is not a device by which food producers may recover damages not provable in Court. There is nothing in its language or legislative history to suggest that it may be used to compel a dealer to pay for food packed for resale to the public which was rejected because it could not stand inspection.

The Act creates no new legal obligations, but merely provides a summary remedy for certain violations of contractual obligations involving agricultural commodities in cases where those violations involve elements of fraud or other immoral conduct. The problem with which Congress was attempting to deal was that created by the possibility of fraud in cases where the legal obligations were clear,

but because of the small amount involved, the protection of rights through ordinary legal processes was economically impossible. See, Statement of Mr. Haugen, Chairman of the Committee on Agriculture, House of Representatives, 72 Cong. Rec., p. 8538, 71st Cong., 2d Sess., May 7, 1930. To the opponents of the bill who argued that the Act would make the Secretary of Agriculture a collection agency for all produce dealers, Mr. Summers, author of the bill, gave the assurance that the Act was intended to deal primarily with small claims arising out of conduct that was essentially fraudulent. 72 Cong. Rec., p. 8541, 71st Cong., 2d Sess. The act was not intended to repeal the law of sales or to destroy the rights and liabilities of parties to sales contracts. *Le Roy Dyal Co. Inc. v. Allen*, 161 F. 2d 152, 157 (CCA 4, 1947). Nor does it bar any defense because it was not raised before the Secretary. *Ernest E. Fadler Co. v. Hesser*, 166 F. 2d 904, 906, (CCA 10, 1948).

Even if a contract F. O. B. Chicago had actually been made, as found below, appellants had the right to reject the merchandise which the seller refused to permit them to inspect. The District Court's conclusion that no right of inspection existed under such a contract is unsupported by any finding of the Secretary and is contrary to law.

No problem of the determination of the governing law is raised, since the law of sales in Michigan, Maryland, and the District of Columbia are identical, all of these jurisdictions having adopted the Uniform Sales Act. Title 28, District of Columbia Code, 1940, Sections 1101-1608; Michigan Compiled Laws, Sections 440.1-440.78; Maryland Code, 1939, Article 88, Sections 19-96.

Under the Uniform Sales Act, Lerman Brothers had a legal right to examine the merchandise before paying for it, even if it had been delivered under the F. O. B. Chicago contract alleged in the complaint. Section 47 of that Act (28 D. C. Code, 1940, §1307) grants such a right in the following terms:

§47. Right to examine the goods.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

There was no agreement that the buyer should not have a right of inspection. The undisputed testimony is that nothing whatsoever was said with reference to inspection when the sale was made (App. 99, 109). The Secretary and the Court below found an "F. O. B." sale (App. 50). "F. O. B." is defined by the Secretary in regulations issued pursuant to Section 15 of the Perishable Agricultural Commodities Act, as follows (7 CFR, Ch. I, Section 46.24(i)):

"F. o. b." (for example, "f. o. b. Laredo, Tex.," or even "f. o. b. California") means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of land transportation at shipping point, in suitable shipping condition (see definitions of "suitable shipping condition", paragraphs (j) and (k) of this section), and that the buyer assumes all risk of damage and delay in transit not caused by the shipper, irrespective of how the shipment is billed. *The buyer shall have the right of inspection at destination before the goods are paid for*, but only for the purpose of determining that the produce shipped complied with the terms of the contract or order at time of shipment, subject to the provisions covering suitable shipping condition. Such right of inspection shall not convey or imply any right of rejection by the buyer because of any loss, damage, deterioration, or change which has occurred in transit (Emphasis supplied).

No claim is made that Lerman Brothers had any opportunity to examine the merchandise before the sight drafts were received in Washington. The subsequent refusal of an inspection prevented any legal tender of the merchandise under Section 47(2) of the Uniform Sales Act, quoted above. *Crosland v. Sloam*, 123 Or. 243, 261 P. 701, 702, 703; *Beals v. Hirsch*, 210 App. Div. 684, 211 N. Y. S. 293.

The District Court, having erroneously concluded that there was no right of inspection of the merchandise, proceeded to the further erroneous conclusion that the right had been waived. It reached this conclusion by a mistaken application of Section 46.2(r) of the Secretary's Definitions, 7 CFR, Ch. I, §46.2(r). This section does no more than define the term "reasonable time" as used in Section 46.2(q), which defines the term "reject". The two sections only establish that delivered merchandise must be promptly accepted or rejected. They do not purport to deal with the question of how much time a buyer has to request inspection of stored merchandise which the seller proposes to deliver. Regulation 46.2(r) obviously contemplates a notice of arrival of the merchandise at its ultimate destination, sent to the buyer at the time of such arrival. The Secretary's regulation could not be otherwise interpreted since it is intended to effectuate the purpose of the Perishable Agricultural Commodities Act. The purpose of the Act was clearly set forth in *LeRoy Dyal Co. v. Allen*, 161 F. 2d 152, 156 (CCA 4, 1947), where the Court said:

That statute, as its legislative history shows, was passed primarily to eliminate unfair practices in the marketing of perishable agricultural commodities in interstate commerce in the case of a declining market by making it difficult for unscrupulous persons to take advantage of shippers by wrongful rejection of the goods at a point where it is expensive and impracticable for the shipper to enforce his legal rights.

In this transaction, it was the buyer who was at the mercy of the shipper because of the attempted delivery

at the Chicago warehouse. The goods were in the possession of a warehouseman selected by the seller for its convenience, who held them for its account. The only notice ever received by the buyer was that a specified number of cases of stored merchandise might be obtained by him if he paid the drafts.

Section 47(2) of the Uniform Sales Act provides that the buyer has a right to inspect upon the tender of delivery by the seller. As we have shown at p. 19-21, *supra*, there was no valid tender of delivery at any time. Consequently, a duty to inspect within any specified time was never created.

Under no theory was there any delay in the request for inspection which could have hurt the appellee. Appellee was tendering merchandise stored at its warehouse, over which it retained complete control prior to the payment of the drafts (App. 70-71). If it preferred to dispose of the merchandise elsewhere, it could have recalled the drafts at any time. Whether appellee refused a right of inspection under the alleged contract on which the award is based or whether the denial of inspection prevented the formation of a new contract to accept the merchandise in storage at Chicago is immaterial. It is clear that without the requested inspection, appellants were never legally obligated to accept the merchandise, and there was, accordingly, no rejection which could justify the entry of the reparation order.

In addition to the failure to tender delivery of the merchandise in accordance with the shipping terms of the alleged contract, the seller was guilty of a material breach in his failure to tender the specified quantities. The alleged contract required the seller to deliver 1500 cases of raspberries containing twelve two-pound packages each, a total of 36,000 pounds. The shipments which the seller claims it made to Chicago for Lerman Brothers had no demonstrable relation to the requirements of that contract. In-

stead of shipping the cases called for, it shipped 1276 cases containing sixteen two-pound boxes to the case, a total of 40,832 pounds, or an excess in poundage of more than thirteen per cent.

Reliance on this overshipment, as compliance with the contract, suggests that the shipments to Chicago were not intended for the Lermans when made. They represented only that portion of the appellee's total pack which it ultimately decided to charge to Lerman Brothers. It is not unreasonable to infer that appellee selected these lots to support its claim because they were not in fact of merchantable quality.

With reference to the one-pound packages, the appellee never attempted to supply even half of the amount called for by the order. The delay of eight days in drawing a draft on Lerman Brothers for the merchandise which was actually packed can logically be explained only upon the ground that appellee had previously hoped on July 17 to complete an order which it could not, or did not desire to, fulfill on July 25.

Whatever the reasons for appellee's conduct, its right to hold Lerman Brothers was forfeited because quantity is of the essence in a contract for the purchase and sale of merchandise. *Beals v. Hirsch*, 211 N. Y. S. 293, 214 App. Div. 684; *Kouloris v. Cohen*, 226 N. Y. S. 751, 753, 131 Misc. 407; *Burrows & Warren, Inc. v. Kenyon*, 9 F. 2d 1 (CCA 1, 1925); *De Armond v. Fenwick*, 127 Or. 509, 272 P. 893, 894. This common sense rule was incorporated in the Uniform Sales Act, Section 44 of which gives the buyer an unqualified right of rejection where the quantity offered is not in accordance with the contract. The section provides:

(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not

going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

Since Lerman Brothers had a right to reject or accept the erroneous quantities of goods offered by the seller, they had a right to insist on inspecting the merchandise before they exercised that election. The seller's refusal to permit inspection, in fact, precipitated the ultimate rejection, but the reason for the rejection was of no concern to any one except Lerman Brothers. They had a legal right to reject; they did reject, and no liability can attach to them by reason of that rejection.

Nor can it be argued that the seller had a right to deliver in installments as appellee attempted to do. The order called for two carloads of merchandise to be delivered to a carrier for shipment to Washington, D. C. Appellee's attempt to deliver in piece-meal installments on July 9, 10, 12, 16, and 17, if the shipments to Chicago are regarded as attempts at delivery, were without authority from Lerman Brothers. Lerman Brothers had a statutory right to reject such installment deliveries. *Uniform Sales Act*, §45; *Burrows & Kenyon v. Warren*, 9 F. 2d 1 (CCA 1, 1925).

In the foregoing paragraphs, we have demonstrated that the reparation order was unjustified as a matter of law, even if the erroneous findings below are accepted as correct. There is no violation of the Perishable Agricultural Commodities Act unless it appears that a rejection was in violation of the contract *and* without reasonable cause.

Inasmuch as the rejection was not in violation of the contract, the reparation order must fall for that reason, but under the circumstances of this case, no reasonable man would have paid the sight drafts.

This was a substantial transaction, involving more than twenty thousand dollars. The merchandise had been packed by a processor with whom the Lermans had not previously dealt. As to the one-pound pack, Lerman Brothers was asked to pay a price of forty cents a pound, although the contract price was subject to a buyer's approval never given. Even more suspicious was the conduct of the seller in reducing the price of the two-pound merchandise below that stated in the order. This "concession" was made at a time when the market for frozen raspberries was extremely strong (App. ~~229~~), and all dealers were desperately trying to secure merchandise of this character. For the seller without explanation and without apparent reason to reduce the price of these goods was a step which could not fail to put a prudent buyer on his guard.

With this background, Lerman Brothers requested an inspection of the merchandise by the impartial inspectors of the Department of Agriculture. Their certification would make it impossible for the Lermans to claim that the goods did not satisfy the contract if the goods were as represented. Yet the seller insisted that the Lermans pay for the goods sight unseen. It also insisted that the Lermans agree to the price fixed for the one-pound raspberries without any inspection, despite the fact that the contract price of this merchandise was subject to their approval and they could not be expected to approve any price without knowledge of the quality of the merchandise. In addition, the seller insisted that Lerman Brothers accept a substantially greater amount of the two-pound pack than they had ordered. If the Lermans desired to select the amount called for by the contract from the greater amount

tendered, they could not reasonably be expected to do so without inspection. In spite of these common sense reasons for an inspection, apparent to any honest seller, the appellee refused inspection and sought to rely on an assertion of technical legal rights it did not have.

CONCLUSION

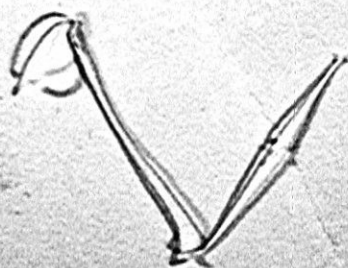
Neither the language nor the legislative history of the Perishable Agricultural Commodities Act sanctions the reparation order in this case. Nor can any conscious construction of the Act be attributed to the Secretary's findings since the order was entered by default, without consideration of the evidence or the inspection issue. The findings of the Court below on the inspection issue were erroneous as a matter of law, and its adoption of the Secretary's fact findings was contrary to the evidence.

We respectfully submit that the judgment should be reversed with directions to vacate the Secretary's award and enter judgment in favor of appellants.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,737

HARRY LERMAN, SAMUEL LERMAN, MYER LERMAN,

Appellants,

vs.

FRUIT PROCESSORS, INC.,

Appellee.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

240 Filed Sep 17 1948 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HARRY LERMAN, SAMUEL LERMAN, and MYER
LERMAN, co-partners, trading as LERMAN BROTHERS,
4th and D Streets, S. W.,
Washington, D. C.,
Petitioners

vs.

FRUIT PROCESSORS, INC.,
1207 Ann Street,
St. Joseph, Michigan,
Appellee

Civil Action No. 3851-'48

*Petition for Review of Reparation Order Under
Perishable Agricultural Commodities Act*

1. Jurisdiction of this cause is granted to this Court by Section 7 of the Perishable Agricultural Commodities Act (46 Stat. 531, 71st Congress, 7 U. S. C. 499g(c)).

2. Petitioners are citizens of the United States and residents of the District of Columbia, and are engaged as co-partners in the business of dealing in frozen fruits and vegetables within the District of Columbia. Fruit Processors, Inc., is a corporation whose post office address is: 1207 Ann Street, St. Joseph, Michigan.

3. On or about March 10, 1948, the Secretary of Agriculture, at the instance of Fruit Processors, Inc., served upon the petitioners a complaint alleging that a contract was entered into for the sale of designated quantities and packs of frozen red raspberries by Fruit Processors, Inc., to the petitioners herein. Through inadvertence and excusable neglect, petitioners herein failed to answer said

complaint, and on July 7, 1948, an order was entered by default requiring petitioners to pay Fruit Processors, Inc., the sum of \$14,610.55 with interest thereon at 5 percent per annum from August 1, 1946 until paid.

241 4. On August 4, 1948, petitioners filed a petition for reopening and reconsideration of said complaint, and tendered therewith a good and sufficient answer to the complaint of Fruit Processors, Inc.

5. On August 19, 1948, the Secretary of Agriculture, acting by and through his authorized officer, denied said petition for reconsideration.

6. The grounds upon which petitioners rely to defeat the right of Fruit Processors, Inc., to recover the damages claimed by them are as follows:

(a) Petitioners never at any time entered into a contract for the purchase of any specified quantity of red raspberries as claimed by Fruit Processors, Inc.

(b) The frozen red raspberries offered to the petitioners herein were deposited in a warehouse at Chicago, Illinois, and complainants requested the United States Department of Agriculture to inspect the same for quality. Fruit Processors, Inc., refused to permit such inspection of merchandise, and, as a result thereof, petitioners refused to purchase the same.

(c) Fruit Processors, Inc., at the time of the refusal of the petitioners to purchase the said frozen raspberries, failed, neglected and refused to take such reasonable and necessary steps as would have prevented any damage to them as a result of respondents' refusal to purchase said red raspberries.

WHEREFORE, Petitioners pray that a trial de novo be granted in this case in accordance with law and that this Court enter judgment that petitioners are not indebted to Fruit Processors, Inc.

BELL and EHRLICH

• • • •

243 Filed Oct 8 1948 Harry M. Hull, Clerk

*Answer to Petition for Review of Reparation Order Under
Perishable Agricultural Commodities Act*

1. Appellee admits the matters contained in paragraph One (1) of appellant's petition.

2. Appellee admits the matters contained in paragraph Two (2) of appellant's petition.

3. Appellee admits that complaint was served upon appellant in the manner alleged, but denies that appellant's failure to make answer thereto was through "inadvertence and excusable neglect". Further answering paragraph Three (3) of appellant's petition, the appellee admits the entry of the reparation order on the date and in the amount alleged.

4. Appellee admits that on August 4, 1948 appellant filed its petition to reopen and reconsider, but as to the allegation that appellant tendered a good and sufficient answer to the complaint of Fruit Processors, Inc., appellee is without knowledge or information sufficient to form a belief as to the truth of such averment.

5. Appellee admits that the Secretary of Agriculture, acting through his authorized officer, denied said petition after accepting the same as though filed within the time prescribed by rule.

244 6. Answering paragraph Six (6) of appellant's petition, appellee says:

(a) Appellee denies appellant's allegation that Petitioners never at any time entered into a contract for the purchase of any specified quantity of red raspberries from Fruit Processors, Inc.;

(b) Appellee admits that the merchandise which is the subject of pending controversy was stored in a warehouse at Chicago, Illinois, and that appellant's request made to inspect the same was refused. Further in that connection appellee says that such inspection was not one of the terms of sale;

(c) Appellee denies that it failed to take reasonable and necessary steps to prevent damage resulting from the refusal of appellant to pay for the merchandise in question.

WHEREFORE, appellee denies that appellant is entitled to judgment to the effect that it not indebted to Fruit Processors, Inc.

FRUIT PROCESSORS, INC.

Dated: October 6th, 1948.

* * * *

247 Filed Oct 25 1948 Harry M. Hull, Clerk

UNITED STATES OF AMERICA

Before the Secretary of Agriculture

P. A. C. A. Docket # 4922

FRUIT PROCESSORS, INC., A MICHIGAN Corporation,
Complainant.

vs.

HARRY LERMAN, SAMUEL LERMAN, and MYER
LERMAN, Co-Partners, doing business as LERMAN
BROTHERS,

Respondent.

COMPLAINT 3851-48

Complainant above named respectfully alleges:

1. That Complainant is a corporation, organized and existing under the laws of the State of Michigan, whose post office address is 1207 Ann Street, St. Joseph, Michigan.

2. Complainant is informed and believes that Respondent is a partnership composed of HARRY LERMAN, SAMUEL LERMAN, and MYER LERMAN, doing business as LERMAN BROTHERS, whose post office address is 4th Street & Virginia Avenue, Washington (4) District of Columbia.

3. That Respondent, at the time of the transactions involved herein, was licensed, or was subject to license,

under the Perishable Agricultural Commodities Act of 1930, as a dealer or commission merchant.

4. That on or about the 5th day of July, 1946, in the course of interstate commerce, Complainant, by contract in writing, sold to the Respondent, 36,000 pounds of Frozen Red Raspberries in heavy syrup packed in one pound containers at the agreed price of \$0.40 per pound, and 36,000 pounds of Frozen Red Raspberries in heavy syrup packed in two pound containers at the agreed price of \$0.39 per pound, and 600 thirty pound tins of Frozen Red Raspberries @ \$0.35 per pound. The total sale price F. O. B. Chicago was \$31,140.00. Said merchandise was ordered shipped to Swift & Company Union Stock
248 Yards, Chicago, Illinois, via trucks, with first month's storage and handling charges to be paid by Complainant, and subsequent storage and handling charges to be paid for by Respondent. Terms of sale were net cash, sight draft with warehouse transfer order attached, through the American Security & Trust Company, 7th & E. Streets, Washington, D. C., That attached hereto and made a part hereof and marked "Exhibit 1" is the original purchase order dated July 5, 1946, signed by R. MILLER for W. J. A. DIETRICH COMPANY as broker, representing the respondent. Further in that connection, complainant says that it does not have adequate freezing facilities for quantities represented by Respondents purchase order, and that freezing is ordinarily done in Chicago warehouses, and that the 600 thirty pound tins of Frozen Red Raspberries on said order were, at the date of the order, already in storage in the Chicago warehouse of Swift & Co.

51. That said contract was negotiated by W. J. A. DIETRICH COMPANY, a brokerage firm of Baltimore, Maryland, whose post office address is Tower Building, Baltimore Street & Guilford Avenue, Baltimore 2, Maryland, who acted in negotiating such sale as agent for Respondent.

6. That Mr. David Beasley, representing said brokerage firm, requested that red raspberries be packed in consumer containers, and upon being informed by complainant that complainant had only two pound containers available, appraised Respondent by phone of this fact. Respondent then volunteered to provide one pound containers for one car if Complainant would pack another car lot in two pound containers. Without any further acts on the part of Complainant toward securing one pound containers, Complainant received on or about July 15, 1946, a shipment of 240 cartons of one pound containers from Harman

249 Frozen Foods, Junction City, Tennessee, via Huber & Huber. Complainant has never been requested to pay for said containers, and believes and therefore alleges the truth to be that said containers were shipped to Complainant under instructions from the Respondent. Complainant paid the freight invoice of Lake Shore Motor Transit Lines, Inc. to cover shipping costs of said one pound cartons, and attaches a copy of said invoice hereto as Complainants "Exhibit 24".

7. Within a few days after the date of said order, Complainant received two rubber stamps for imprinting the trade name "FROSTEE" and the name of Respondent as Distributors. An imprint of said stamps is attached hereto as Complainants "Exhibit 25". Said rubber stamps bear the manufacturers name of Hay Rubber Stamp Co. Washington, D. C. Complainant has never ordered rubber stamps from the Hay Rubber Stamp Co., and did not order the stamps in question, and believes, and therefore alleges the truth to be that said stamps were sent to Complainant at the direction of Respondent.

8. That on July 6, 1946, Complainant had in storage in Chicago, Illinois, 600 tins of Frozen Red Raspberries packed in 30 pounds tins, which 600 tins were, on July 9, 1946 in partial compliance with said contract in writing, shipped to Respondent and were thereafter accepted by Respondent and thereafter paid for by Respondent by

transfer of funds to the First National Bank, Lansing, Michigan on July 15, 1946, for the account of Complainant.

9. That on July 10, 1946, Complainant, in further compliance with said order, shipped 34,784 pounds of Frozen Red Raspberries in heavy syrup packed in two pound containers, and on July 12, 1946 Complainant shipped 6,048 pounds of Frozen Red Raspberries in heavy syrup packed in two pound containers, and on July 25, 1946 Complainant shipped 17,232 pounds of Frozen Red Raspberries in heavy syrup packed in one pound containers all of said merchandise being shipped from loading points in the County of Berrien and State of Michigan, in interstate commerce to Respondent at its designated warehouse, to-wit: Swift & Company Union Stock Yards, Chicago, Illinois, and that the commodity was of the kind, quality, grade and size called for in said contract of sale, and that the commodity was shipped in trucks operated by House Brothers Trucking Company, a contract hauler, of Benton Harbor, Michigan. In support thereof Complainant attaches hereto and makes a part hereof Warehouse Receipts #7062 — #7066 — #7068, and #7072, and marked Complainants "Exhibits 9, 10, 11, and 12, issued by Swift & Co., Chicago, Illinois, evidencing the receipt of said merchandise from Complainant.

10. That upon arrival of said merchandise at the destination designated by Respondent, the same was accepted for storage in compliance with said contract of sale but the Respondent has since failed, neglected and refused to pay Complainant the agreed purchase price or any part thereof.

11. That the matters and actions set-forth herein constitute a violation of Section 2, of the Perishable Agricultural Commodities Act of 1930.

12. That Complainant after a reasonable time and after demand for payment for said merchandise and after notification of Respondent that Complainant would proceed to sell the remainder of said merchandise at the best price

obtainable and hold Respondent liable for any loss sustained by virtue thereof, did proceed to sell said merchandise at the best price obtainable, and received therefor after payment of brokerage and freight, the sum of \$9,138.12. In support thereof Complainant attaches hereto and makes a part hereof as Complainants Exhibits 2, 3, 4, 5, 6, 7 and 8 and 8A - 8B - 8C, copies of the invoices representing such sales to other customers of Complainant. Also attached hereto and made a part hereof as Complainants Exhibits 13, 14, 15, 16, 17, 18, 19, 20, and 21 are copies of Complainants Warehouse Transfer Orders, authorizing the release from storage of the several lots of merchandise so sold to other customers to mitigate loss. Such Warehouse Transfer Orders were issued on prior payment by the Transferee and Complainant has no knowledge of the dates of subsequent withdrawals from storage by the several purchasers as such information would normally be deemed to be confidential by the Storage Agent.

Attached hereto and made a part hereof as Complainants "Exhibit 26" is a recapitulation of the dates and manner of payments received from such sales on said invoices to other customers and set forth in Complainants Exhibits 2 through 8. Also contained in "Exhibit 26" is a recapitulation of the brokerage and freight paid by Complainant in effecting the sales represented in invoices herein marked 2 through 8.

13. That Complainant has necessarily expended in behalf of said Respondent for storage on said merchandise subsequent to the first month of storage the sum of \$862.01, and that attached hereto and made a part hereof as Complainants "Exhibit 22" is a schedule of invoices paid to Swift & Co., Chicago, Illinois for storage of said merchandise sold to Respondent and not paid for by Respondent.

14. That Complainant has necessarily expended in behalf of said Respondent for insurance on said merchandise

ordered by Respondent but not paid for by Respondent the sum of \$69.38 and that attached hereto and made a part hereof as Complainants "Exhibit 23" in support thereof is a copy from a general coverage statement of Queens Insurance Company disclosing the average holdings in Swift & Co., Chicago, Illinois warehouse, and the rate of insurance for such coverage.

15. That the total price of said merchandise delivered to and not paid for by Respondent amounted to \$22,817.28, and that Complainant has expended in behalf of said Respondent the sum of \$862.01 for storage on said merchandise, and the further sum of \$69.38 for insurance on said merchandise while in storage, and that Respondent has received from the resale of said commodities
252 in an attempt to mitigate loss the net sum of \$9,138.12.

16. That there is now due and owing the Claimant the sum of \$14,610.55 plus interest at the legal rate per annum on all sums withheld from Claimant from date of demand to date of payment, and that demand was made on Respondent by sight drafts drawn on Respondent through Michigan National Bank, Lansing, Michigan in the amount of \$13,565.76 on July 10, 1946 as evidenced by a copy thereof attached hereto and made a part hereof and marked Complainants "Exhibit 27", and in the amount of \$2,358.72 on July 12, 1946 as evidenced by a copy thereof attached hereto and made a part hereof and marked Complainants "Exhibit 28", and in the amount of \$6,892.80 on July 25, 1946 as evidenced by a copy thereof attached hereto and made a part hereof and marked Complainants "Exhibit 29".

17. That Complainant having been advised by the Michigan National Bank of Lansing, Michigan that drafts number 378 - 510, and 550 covering said merchandise were unpaid, wired W. J. A. DIETRICH COMPANY, broker for Respondent located at Baltimore, Maryland, requesting the said broker to ascertain the cause of non-payment,

and advise by wire, a copy of which wire to said broker is attached hereto and made a part hereof and marked Complainants "Exhibit 30".

18. That in reply to said telegram W. J. A. DIETRICH COMPANY, on July 23, 1946, wired Complainant to the effect that the LERMAN draft for cherries (which merchandise was also covered by the purchase agreement giving rise to subject controversy) was paid, and that the other drafts covering merchandise for which Complainant seeks payment, was being paid "tomorrow", a copy of which telegram Complainant attaches hereto and makes a part hereof and marks "Exhibit 31".

19. That on August 7, 1946 Complainant wired Respondent by Day Letter informing Respondent that payment of said drafts had been withheld an unreasonably long time, and notifying them that if they were not paid by the close of business on August 8 the drafts would be recalled, the merchandise would be sold at the best
253 price obtainable, and Complainant would hold Respondent responsible for damages, a copy of which Day Letter is attached hereto and made a part hereof and marked "Exhibit 32".

20. That on November 20, 1946 Complainant again wrote W. J. A. DIETRICH COMPANY relative to said merchandise and received in reply thereto a letter from said DIETRICH COMPANY dated November 25, 1946 affirming the original transaction, a copy of which letter is attached hereto and made a part hereof and marked "Exhibit 33".

21. That on January 30, 1947 Complainant through its then attorney Francis J. Miller, now deceased, wrote to Respondent again offering them an opportunity to accept merchandise and make payment therefore in accordance with the original contract, but that no reply was received thereto, a copy of said letter is attached hereto and made a part hereof and marked "Exhibit 34".

WHEREFORE Complainant prays that copy of this complaint be served upon the above-named Respondent and that it be required to answer the charges herein stated in writing within such time as the Secretary may require; that, upon the record made, either with or without formal hearing, as provided in the act or in the regulations, and by appropriate order, the Complainant be awarded such amount of damages as it may be entitled to receive according to the facts established; and that the Secretary also make such other further orders and take such disciplinary action contemplated by Section 8 of the Act as may be deemed fit and proper in the premises.

Dated at St. Joseph, this 5th day of January, 1948.

/s/ Fruit Processors, Inc.

Complainant

By: /s/ C. A. Elder

Title: Vice President

Myron H. Wolcott

Attorney for Complainant

Business Address:

Peoples State Bank Bldg.

St. Joseph, Michigan

• • • •

255 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 1

W. J. A., DIETRICH CO.

Bulk, Institutional and Consumer Packages
Tower Bldg., Baltimore St. & Guilford Ave.
Baltimore 2, Maryland

For Account of: FRUIT PROCESSORS, INC.

Sold to: Lerman Brothers,
4th St. & Va. Ave.

Washington 4, D. C.

TERMS: S/D Thru: American Security & Trust Co.
7th & E. St., S. W.,
Washington 4, D. C.

Remarks: F. O. B. Michigan

No. 114

Date: 7/5/46

Quantity	Size	Brand and Commodity—Price		Per
1500 Cases	12/2#	Frozen Red Raspberries	5x1 .40	lb.
1500 Cases	24/16oz.	" " "	" S.A.P.	40¢
600	30#	Tins Frozen Red Raspberries	35¢	
		FOB Chicago		

SALES MEMORANDUM

Subject to confirmation of seller. This memo becomes void when sale is covered by contract. If incorrect advise immediately.

W. J. A. DIETRICH COMPANY
Per s/ R. MILLER

• • • •

258 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 2

NO: 602

FRUIT PROCESSORS, Inc.
 Member Midwest Frozen Foods Council
 St. Joseph, Michigan
 Phone 3-3901

Sold To Foster Beef Co.

Address Manchester, New Hampshire

Shipped To Swift & Company

Via Truck

Terms Net cash sight draft with warehouse transfer order
 attached.

Date November 12, 1946

Contract No. 11136

Broker Broch

F. O. B. Chicago, Illinois

<i>Quantity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Extension</i>
100	Cases 24/1# Red Rasp-			
	berries in heavy syrup	200	4.56	\$912.00
	Dozen doz.			

(Other items sold to the above named purchaser having
 no relation to merchandise sold to mitigate loss are not
 copied on this exhibit.)

Buyers Copy

Copy

259

Exhibit No. 3

NO: 604

FRUIT PROCESSORS, Inc.
 Member Midwest Frozen Foods Council
 St. Joseph, Michigan
 Phone 3-3901

Sold To Hanscom Bakeries
 Address 9 North 52nd St. Philadelphia, Pa.
 Shipped To Above
 Via Air Express
 Terms Net cash upon receipt of invoice.
 Date November 13, 1946
 Contract No. X
 Broker W. J. A. Dietrich
 F. O. B. Chicago, Illinois

<i>Quantity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Extension</i>
169	2# packages Red Rasp-			
	berries in heavy syrup.	338	39¢	\$131.82

(Other items sold to the above named purchaser having
 no relation to merchandise sold to mitigate loss are not
 copied on this exhibit.)

Buyers Copy

Copy

Exhibit No. 4

260

Fruit Processors, Inc.
 Member Midwest Frozen Foods Council
 St. Joseph, Michigan
 Phone 3-3901

NO: 629

Sold To High Hat Ice Cream
 Address 6859 Archer Ave. Chicago, Illinois.
 Shipped To Swift & Company
 Via Truck
 Terms Net cash upon receipt of invoice.
 Date March 6, 1947
 Contract No. X
 Broker X
 F. O. B. Chicago, Illinois

<i>Quantity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Extension</i>
2	Cases 16/2# packages Red Raspberries.	64	33¢	\$21.12
	(Other items sold to the above named purchaser having no relation to merchandise sold to mitigate loss are not copied on this exhibit.)			

Buyers Copy

Exhibit No. 5

261

Fruit Processors, Inc.
 Member Midwest Frozen Foods Council
 St. Joseph, Michigan
 Phone 3-3901

NO: 647

Sold To High Hat Ice Cream
 Address 6859 Archer Ave.
 Shipped to above
 Via Truck
 Terms Net cash upon receipt of invoice.
 Date May 27, 1947
 Contract No. X
 Broker X
 F. O. B. Chicago, Illinois

<i>Quantity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Extension</i>
3	Cases 16/2# packages Red Raspberries	96	33¢	\$31.68
	(Other items sold to the above named purchaser having no relation to merchandise sold to mitigate loss are not copied on this exhibit.)			

Buyers Copy

Exhibit No. 6

262

Fruit Processors, Inc.
 Member Midwest Frozen Foods Council
 St. Joseph, Michigan
 Phone 3-3901

NO: 686
 COPY

Sold To Wrigley Stores, Inc.
 Address 14381 Livernois St., Detroit, Mich.
 Shipped To Above
 Via Truck
 Terms Net cash upon receipt of invoice.
 Date July 18, 1947
 Contract No. X
 Broker C. C. Greiner
 F. O. B. Detroit, Mich.

<i>Quan- tity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Exten- sion</i>
250	Cases 24/1# packages Red Raspberries	6,000	17¢	\$1,020.00
	Other items sold to the above named purchaser having no relation to merchandise sold to mitigate loss are not copied on this exhibit.			

Office Copy

Exhibit No. 7

263

Fruit Processors, Inc.
Member Midwest Frozen Foods Council
St. Joseph, Michigan
Phone 3-3901

NO: 707

Sold To W. J. A. Dietrich Company

Address 1201 Tower Building Baltimore 2, Md.

Shipped To

Via

Terms Net cash sight draft with warehouse transfer order
attached.

Date August 5, 1947

Contract No. 757

Broker W. J. A. Dietrich

F. O. B. Chicago, Illinois

Quantity	Description	Pounds	Price	Extension
200	Cases 16/2# packages Red Raspberries.	6,400	15¢	\$960.00

Buyers Copy

Exhibit No. 8

264

Fruit Processors, Inc.
Member Midwest Frozen Foods Council
St. Joseph, Michigan
Phone 3-3901

NO: 708
COPY

Sold To National Syrup Products Co.
Address 365 E. Illinois St., Chicago, Ill.
Shipped To Swift & Co. Chicago, Ill.
Via Trucks

Terms Net cash sight draft with warehouse transfer order
attached.

Date August 5, 1947

Contract No. X

Broker W. I. Massey

F. O. B. Chicago, Illinois

<i>Quan- tity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Exten- sion</i>
16,857	2 Lb. packages Red Raspberries	33,714	15¢	\$5,057.10
8,432	1 Lb. packages Red Raspberries	8,432	15¢	1,264.80
	Total	42,146		\$6,321.90

Other items sold to the above named pur-
chaser having no relation to merchandise sold
to mitigate loss are not copied on this exhibit.

Office Copy

Exhibit No. 8-A

265

Fruit Processors, Inc.
 Member Midwest Frozen Foods Council
 St. Joseph, Michigan
 Phone 3-3901

NO: 681
 COPY

Sold To Squire-Dingee Company
 Address 1918 N. Elston, Chicago, Ill.
 Shipped To Swift & Co., Chicago, Ill.
 Via House Bros. Trucks.
 Terms Net cash on receipt of invoice.
 Date July 16, 1947
 Contract No. X
 Broker X
 F. O. B. Chicago, Illinois

<i>Quan- tity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Exten- sion</i>
12	Cases 24/1# Red Raspberries	288	15¢	\$43.20
	Release No: 681			

(Other items sold to the above named purchaser having no relation to merchandise sold to mitigate loss are not copied on this exhibit.)

Office Copy

Exhibit No. 8-B

266

Fruit Processors, Inc.
 Member Midwest Frozen Foods Council
 St. Joseph, Michigan
 Phone 3-3901

MEMO NO. 2

Sold To Fruit Processors, Inc.
 Address St. Joseph, Mich.
 Shipped To Above
 Via X
 Terms Net
 Date Nov. 1, 1947.
 Contract No. X
 Broker X
 F. O. B. X

<i>Quantity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Extension</i>
	To set up an allowance for 300 pounds in 1# & 2# packages Red Raspberries used by the various brok- ers in the sales of same.	301	x	\$61.00
Office Copy				

Exhibit No. 8-C

267

Fruit Processors, Inc.

Member Midwest Frozen Foods Council

St. Joseph, Michigan

Phone 3-3901

MEMO No: 1

Sold To House Bros. Trucking Co.

Address Benton Harbor, Mich.

Shipped To Swift & Co., Chicago, Ill.

Via House Bros. Trucks.

Terms Net

Date July 10, 1946

Contract No. Load No. 881

Broker X

F. O. B. Chicago, Illinois

<i>Quantity</i>	<i>Description</i>	<i>Pounds</i>	<i>Price</i>	<i>Extension</i>
1	Case 16/2# Red Raspberries in transit	32	40¢	\$12.80

Office Copy

268 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 9

NO: 7062

Copy

ORIGINAL
SWIFT & CO.
4115 Packers Ave.,
Chicago 9, Ill.

Received in Storage Warehouse 25 Hse., Freezer Storage
Dept. for the account of Fruit Processors, Inc., 1207 Ann
St., St. Joseph, Mich.

<i>Lot</i>	<i>Sub-</i>	<i>Date Recd.</i>	<i>Said</i>	
<i>No:</i>	<i>lot</i>	<i>for</i>	<i>to con-</i>	<i>Weight</i>
<i>Marks</i>	<i>storage</i>	<i>Qua-</i>	<i>Packages</i>	
		<i>tity</i>		
1511		7-9-46	542 Ctns. 16/2# ctns. each Fresh Red Rasp- berries.	

Received by truck.

The above goods are received subject to the following conditions which are agreed to by the acceptance of this receipt and contract.

1. All property is stored at owner's risk of loss from fire, water, leakage, vermin, rattage, breakage, accidental or providential causes, strikes, riots, or insurrection.

2. The undersigned shall not be responsible for shrinkage in weight, loss or damage resulting from temperature changes, or other causes incident to general storage, nor shall it be required to provide for any insurance thereon.

3. No goods shall be delivered except upon complete directions with regard thereto signed by Fruit Processors, Inc., St. Joseph, Mich.

4. All of said goods shall be removed from the undersigned's premises on or before _____

5. The undersigned claims a lien for all lawful charges for storage and preservation of goods, also for all lawful

claims of money advanced, interest, insurance, transportation, labor, weighing, cooperating, and other charges and expenses in relation to such goods.

6. This receipt is NOT NEGOTIABLE.

STORAGE RATES, ETC.

HANDLING	PER	in and out inclusive
STORAGE	32¢ PER CWT. net weight	FIRST MONTH
STORAGE	14¢ PER " "	PER MONTH or fraction thereafter

SWIFT & CO., CHICAGO, ILL.

By C. C. Patton

General Foreman, Freezer Stg. Dept.

NOTE: Other items of storage in Swift & Co. having no relation to merchandise sold to mitigate loss are not copied on this exhibit.

269 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 10

No: 7066

ORIGINAL

SWIFT & CO.

4115 Packers Ave.,

Chicago 9, Ill.

Received in Storage Warehouse 25 Hse., Freezer Storage Dept. for the account of Fruit Processors, Inc., 1207 Ann St., St. Joseph, Mich.

Lot	Sub-	Date Recd.	for	Quan-	Said	
No:	lot	Marks	storage	tity	to con-	Weight
1518		7-10-46	544	Ctns. 16/2#	ctns.	
				each Red raspber-		17408
				ries & syrup		1120
			35			
			579			17528

The above goods are received subject to the following conditions which are agreed to by the acceptance of this receipt and contract.

1. All property is stored at owner's risk of loss from fire, water, leakage, vermin, rattage, breakage, accidental or providential causes, strikes, riots, or insurrection.

2. The undersigned shall not be responsible for shrinkage in weight, loss or damage resulting from temperature changes, or other causes incident to general storage, nor shall it be required to provide for any insurance thereon.

3. No goods shall be delivered except upon complete directions with regard thereto signed by Fruit Processors, Inc., St. Joseph, Mich.

4. All of said goods shall be removed from the undersigned's premises on or before _____

5. The undersigned claims a lien for all lawful charges for storage and preservation of goods, also for all lawful claims of money advanced, interest, insurance, transportation, labor, weighing, cooperating, and other charges and expenses in relation to such goods.

6. This receipt is NOT NEGOTIABLE.

STORAGE RATES, ETC.

HANDLING	PER	in and out inclusive
STORAGE	32¢ PER CWT. net weight	FIRST MONTH
STORAGE	14¢ PER " "	PER MONTH or
fraction thereafter		

SWIFT & CO., CHICAGO, ILL.

By C. C. Patton

General Foreman, Freezer Stg. Dept.

NOTE: Other items of storage in Swift & Co. having no relation to merchandise sold to mitigate loss are not copied on this exhibit.

270 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 11

No: 7068

ORIGINAL
SWIFT & CO.

4115 Packers Ave.,
Chicago 9, Ill.

Received in Storage Warehouse 25 Hse., Freezer Storage
Dept. for the account of Fruit Processors, Inc., 1207 Ann
St., St. Joseph, Mich.

Lot	Sub-	Date Recd.	for	Quan-	Said	
No:	lot	Marks	storage	tity	to con-	Weight
1521		7-11-46	154 Ctns.	16/2 Red		
				Raspberries		4928

The above goods are received subject to the following conditions which are agreed to by the acceptance of this receipt and contract.

1. All property is stored at owner's risk of loss from fire, water, leakage, vermin, rattage, breakage, accidental or providential causes, strikes, riots, or insurrection.

2. The undersigned shall not be responsible for shrinkage in weight, loss or damage resulting from temperature changes, or other causes incident to general storage, nor shall it be required to provide for any insurance thereon.

3. No goods shall be delivered except upon complete directions with regard thereto signed by Fruit Processors, Inc., St. Joseph, Mich.

4. All of said goods shall be removed from the undersigned's premises on or before _____

5. The undersigned claims a lien for all lawful charges for storage and preservation of goods, also for all lawful claims of money advanced, interest, insurance, transportation, labor, weighing, cooperating, and other charges and expenses in relation to such goods.

6. This receipt is NOT NEGOTIABLE.

STORAGE RATES, ETC.

HANDLING PER in and out inclusive
 STORAGE 32¢ PER CWT. net weight FIRST MONTH
 STORAGE 14¢ PER " PER MONTH or
 fraction thereafter

SWIFT & CO., CHICAGO, ILL.

By C. C. Patton

General Foreman, Freezer Stg. Dept.

NOTE: Other items of storage in Swift & Co. having no relation to merchandise sold to mitigate loss are not copied on this exhibit.

271 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 12

No: 7072

ORIGINAL

SWIFT & CO.

4115 Packers Ave.,

Chicago 9, Ill.

Received in Storage Warehouse 25 Hse., Freezer Storage Dept. for the account of Fruit Processors, Inc., 1207 Ann St., St. Joseph, Mich.

<i>Lot</i>	<i>Sub-</i>	<i>Date Recd.</i>	<i>for</i>	<i>Quan-</i>	<i>Said</i>	
<i>No:</i>	<i>lot</i>	<i>Marks</i>	<i>storage</i>	<i>tity</i>	<i>to con-</i>	<i>Weight</i>
				<i>Packages</i>	<i>tain</i>	
1545		7-16-46	380 Ctns.	24/1 Red		
				Raspberries		9120
1546		7-17-46	338 Ctns.	24/1 Red		
				Raspberries		8112

The above goods are received subject to the following conditions which are agreed to by the acceptance of this receipt and contract.

1. All property is stored at owner's risk of loss from fire, water, leakage, vermin, rattage, breakage, accidental or providential causes, strikes, riots, or insurrection.

2. The undersigned shall not be responsible for shrinkage in weight, loss or damage resulting from temperature changes, or other causes incident to general storage, nor shall it be required to provide for any insurance thereon.

3. No goods shall be delivered except upon complete directions with regard thereto signed by Fruit Processors, Inc., St. Joseph, Mich.

4. All of said goods shall be removed from the undersigned's premises on or before _____

5. The undersigned claims a lien for all lawful charges for storage and preservation of goods, also for all lawful claims of money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods.

6. This receipt is NOT NEGOTIABLE.

STORAGE RATES, ETC.

HANDLING	PER		in and out inclu-
			sive
STORAGE	32¢ PER CWT. net weight		FIRST MONTH
STORAGE	14¢ PER	"	PER MONTH or
			fraction thereafter

SWIFT & CO., CHICAGO, ILL.

By C. C. Patton

General Foreman, Freezer Stg. Dept.

NOTE: Other items of storage in Swift & Co. having no relation to merchandise sold to mitigate loss are not copied on this exhibit.

Exhibit No. 15

274 Filed Oct 25 1948 Harry M. Hull, Clerk

Fruit Processors, Inc.
 1207 Ann Street
 St. Joseph, Michigan
 No. 626 Copy (for Lerman Claim)

Date Feb. 28, 1947

Warehouse Transfer Order

To Swift & Co., Union Stock Yards, Chicago, Ill.

Upon receipt of the original copy of this order you are hereby authorized and instructed to **RELEASE** and **TRANSFER** to the order of W. T. Smith Co., 128 S. Center St., Springfield, Ohio. the following merchandise stored in your warehouse in our name

Quantity	Description	Lot No.	Pounds	Our	Date
				Load No.	
125	Cases 16/2# Red Raspberries	1521	4,000		
	NOTE: This lot No. was given by mistake and should have been from Lot 1524. See letter of explanation herewith.				

Storage charges paid by Smith Company.

Storage charges from to are for our account.

Subsequent charges are for the account of the **TRANSFEREE**.**SIGNED:****FRUIT PROCESSORS, INC.**

By

MICHIGAN NATIONAL BANK

By

WAREHOUSE COPY

275 Filed Oct 25 1948 Harry M. Hull, Clerk

Explanation of Smith Release No: 626

At the completion of the pack of 2# red raspberries for the Lerman order, we packed a quantity of 2# packages of red raspberries for W. T. Smith Company. These were carried also in Swift & Company storage under separate lots. One of the Smith lots was LOT 1524 containing 175 cases 16/2# red raspberries.

Through special arrangements Smith sent a truck from Ohio to pick up 125 cases of these berries. The truck arrived at the storage before we had released the goods and consequently called our office on the phone to have the berries released. Through error, this 125 cases containing 4000 pounds was released from lot 1521 whereas it should have been from lot 1524. This error resulted in our having 125 cases, 4000 pounds of 16/2# red raspberries sold for Lerman's account under Lot 1524 instead of under Lot 1521 as evidenced by our release and invoice No. 708 to National Syrup Company.

Had the above error not occurred, this 4000 pounds would have remained in its original lot 1521, so that absolutely no change was made in the actual poundage carried, nor in the dollar value of the raspberries liquidated to partially satisfy our claim against Lerman Bros. Company.

Fruit Processors, Inc.

By: C. A. Elder, mgr.

• • • •

Exhibit No. 22

282

Filed Oct 25 1948 Harry M. Hull, Clerk

STORAGE INVOICE
 SWIFT & COMPANY, CHICAGO, ILL.
 TO:
 FRUIT PROCESSORS, INC.
 ST. JOSEPH, MICH.

INVOICE NO: 2144

DATE: 7-11-46

TERMS NET CASH.

<i>From</i>	<i>To</i>	<i>Lot</i>	<i>Whse. Rect.</i>	<i>Description</i>	<i>Weight</i>	<i>Mos.</i>	<i>Rate</i>	<i>Amount</i>
7-9	8-8-46	1511	7062	Red Raspberries	17344	1	32¢	\$55.50*
Inv. No. 2147 Dated 7-11-46:								
7-10	8-9-46	1518	7066	" "	18528	1	32¢	59.29*
Inv. No. 2155 Dated 7-17-46:								
7-11	8-10-46	1521	7068	" "	4928	1	32¢	15.77*
Inv. No. 2170 Dated 7-18-46:								
7-16	8-15-46	1545	7072	" "	9120	1	32¢	29.18*
7-17	8-16-46	1546	"	" "	8112	1	32¢	25.96*
Inv. No. 2586 Dated 10-9-46:								
8-9	10-8-46	1511	7062	" "	17344	2	14¢	48.56
8-10	10-9-46	1518	7066	" "	18528	2	14¢	51.88
8-11	10-10-46	1521	7068	" "	4928	2	14¢	13.80
8-16	10-15-46	1545	7072	" "	9120	2	14¢	25.54
8-17	10-16-46	1546	"	" "	8112	2	14¢	22.72
Inv. No. 2644 & 5 Dated 10-23-46:								
10-9	11-8-46	1511	7462	" "	17344	1	14¢	24.28
10-10	11-9-46	1518	"	" "	18528	1	14¢	25.94
10-11	11-10-46	1521	"	" "	4590	1	14¢	6.43
10-16	11-15-46	1545	7072	" "	9118	1	14¢	12.76
Inv. No. 2822 & 2824 Dated 11-21-46:								
11-9	12-8-46	1511	7462	" "	17344	1	14¢	24.28
11-10	12-9-46	1518	"	" "	18528	1	14¢	25.94
11-11	12-10-46	1521	"	" "	4590	1	14¢	6.43
11-16	12-15-46	1545	7072	" "	6718	1	14¢	9.40
10-17	11-16-46	1546	"	" "	8112	1	14¢	11.36
11-17	12-16-46	1546	"	" "	8112	1	14¢	11.36

Inv. No. 2983 Dated 12-20-46:

12-9	1-8-47	1511	7462	"	"	17344	1	14¢	24.28
12-10	1-9-47	1518	"	"	"	18528	1	14¢	25.94
12-11	1-10-47	1521	"	"	"	4590	1	14¢	6.43
12-16	1-15-47	1545	7072	"	"	6718	1	14¢	9.40
12-17	1-16-47	1546	"	"	"	8112	1	14¢	11.36

Inv. No. 4056 Dated 1-20-47:

1-19	2-8-47	1511	7462	"	"	17344	1	14¢	24.28
1-10	2-9-47	1518	"	"	"	18528	1	14¢	25.94
1-11	2-10-47	1521	"	"	"	4590	1	14¢	6.43
1-16	2-15-47	1545	7072	"	"	6718	1	14¢	9.40
1-17	2-16-47	1546	"	"	"	8112	1	14¢	11.36

Inv. No. 4194 Dated 2-19-47:

2-9	3-8-47	1511	7462	"	"	17344	1	14¢	24.28
2-10	3-9-47	1518	"	"	"	18528	1	14¢	25.94
2-11	3-10-47	1521	"	"	"	4590	1	14¢	6.43
2-16	3-15-47	1545	7072	"	"	6718	1	14¢	9.40
2-17	3-16-47	1546	"	"	"	8112	1	14¢	11.36

Forward to page 2

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Exhibit No. 22-2

From	To	Lot	Whse. Rect.	Description	Weight	Mos.	Rate	Amount
Inv. No. 4284 Dated 3-17-47:								
3-9	TO 4-8-47	1511	7462	Red Raspberries	17344	1	14¢	\$24.28
3-10	4-9-47	1518	"	" "	18528	1	14¢	25.94
3-11	4-10-47	1521	"	" "	590	1	14¢	.93**
3-12	4-11-47	1524	7434	" "	4000	1	14¢	5.60**
3-16	4-15-47	1545	9310	" "	6718	1	14¢	9.40
3-17	4-16-47	1546	"	" "	8112	1	14¢	11.36
Inv. No. 4437 Dated 4-26-47:								
4-9	5-8-47	1511	7462	" "	17344	1	14¢	24.28
4-10	5-9-47	1518	"	" "	18528	1	14¢	25.94
4-11	5-10-47	1521	"	" "	526	1	14¢	.74**
4-12	5-11-47	1524	7434	" "	4000	1	14¢	5.60**
4-16	5-15-47	1545	9310	" "	6718	1	14¢	9.40
4-17	5-16-47	1546	"	" "	8112	1	14¢	11.36

Inv. No. 4493 Dated 5-19-47:

5-9	6-8-47	1511	7462	"	"	17344	1	14¢	24.28
5-10	6-9-47	1518	"	"	"	18528	1	14¢	25.94
5-11	6-10-47	1521	"	"	"	526	1	14¢	.74**
5-12	6-11-47	1524	7434	"	"	4000	1	14¢	5.60**
5-16	6-15-47	1545	9310	"	"	6718	1	14¢	9.40
5-17	6-16-47	1546	"	"	"	8112	1	14¢	11.36

Inv. No. 4562 Dated 6-19-47:

6-9	7-8-47	1511	7462	"	"	17344	1	14¢	24.28
6-10	7-9-47	1518	"	"	"	18528	1	14¢	25.94
6-11	7-10-47	1521	"	"	"	366	1	14¢	.51**
6-12	7-11-47	1524	7434	"	"	4000	1	14¢	5.60**
6-16	7-15-47	1545	9310	"	"	6718	1	14¢	9.40
6-17	7-16-47	1546	"	"	"	8088	1	14¢	11.32

EXPLANATION: Items marked * are first month storage charges paid by packer.
 " " ** are explained in letter attached.

Re-Cap of Storage Charges.

Invoice No: 2586	\$162.50	Total
2644 & 45	69.41	"
2822 & 24	88.77	"
2983	77.41	"
4056	77.41	"
4194	77.41	"
4284	77.41	"
4437	77.32	"
4493	77.32	"
4562	77.05	"

Total storage paid after 1st month \$862.01

Other items of storage paid to Swift & Co. having no relation to merchandise sold to mitigate loss are not copied on this exhibit.

288 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 27

No Protest

Customer's Draft

No. 378 Lansing, Michigan, July 10, 1946

At Sight Pay to the Order of

Michigan National Bank

Thirteen Thousand Five Hundred Sixty Five & 76/100
Dollars \$13,565.76

Value received and charge same to account of

To Lerman Brothers

4th. St. & Va. Ave. Washington, D. C.

Draft Thru American Security & Trust Co.

7th. & E. St., Washington, D. C.

Fruit Processors, Inc.

By: s/C. A. Elder, V. Pres.

289 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 28

No Protest

Customer's Draft

No. 510 12778 Lansing, Michigan, July 12, 1946

At Sight Pay to the Order of

Michigan National Bank

Twenty Three Hundred Fifty Eight & 72/100 Dollars
\$2358.72

Value received and charge same to account of

To Lerman Brothers

4th St. & Va. Aves. Washington, D. C.

Thru: American Security & Trust Co.

Washington 4, D. C.

Fruit Processors, Inc.

By: s/C. A. Elder, V. Pres.

290 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 29

Wire Mich. Natl. Bank upon payment
 No Protest
 Customer's Draft
 No. 550 Lansing, Michigan, July 25, 1946
 At Sight Pay to the Order of
 Michigan National Bank
 Sixty Eight Hundred Ninety Two and 80/100 Dollars
 \$6892.80
 Value received and charge same to account of
 To Lerman Brothers
 4th. St. & Va. Ave. Washington, D. C.
 Thru: American Security & Trust Co.
 7 & E. Sts. Washington, D. C.
 Fruit Processors, inc.
 By: s/ C. A. Elder, V-Pres.

291

Exhibit No. 30

Western Union
 Joseph L. Egan
 President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

TO: W. J. A. DIETRICH CO. 7 - 22 1946
 Street and No. BALTIMORE ST. & Guilford Ave.
 Place Baltimore, Md.
 Bank Advises following invoice drafts unpaid Lerman numbers 378 and 510 and 550 Sell 505 Stop Please ascertain cause and advise by wire Tuesday.

F. P. INC.

292

Exhibit No. 31

Western Union
Joseph L. Egan
President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

C99 13-Baltimore MD 23 435P 1946 Jul 23 PM 5 32

FRUIT PRICERS INC -

Retel 22nd Lermans Draft Cherries Paid Other Being paid tomorrow. Sell Paying Tomorrow -

W J A DIETRICH CO.

* 22 LERMANS.

295 Filed Oct 25 1948 Harry M. Hull, Clerk

Exhibit No. 34

January 30, 1947

Lerman Brothers
4th Street & Virginia Avenue
Washington 4, D. C.

In re: Fruit Processors, Inc.

Gentlemen:

This letter is being written on behalf of Fruit Processors Inc., whom I represent.

On July 5, 1946, through W. J. A. Dietrich Co., Brokers, you placed an order with Fruit Processors, Inc. for one car of one pound cartons of frozen red raspberries and one car of two pound cartons of frozen raspberries. This was a special pack for you and when completed drafts were sent for collection, but you refused to take them up.

Fruit Processors, Inc., now propose to dispose of this special pack of raspberries for the best price obtainable, and appropriate steps to recover the loss from your breach of contract. However, Fruit Processors, Inc. will give you an opportunity to accept this merchandise under your original order, as you may be able to sell to better advantage than they can. Will you please advise immediately whether you desire to accept the merchandise packed for you under your order of July 5, 1946.

Unless some word is received from you by February 10, 1947, Fruit Processors, Inc. will proceed with the sale of these goods. If you wish to complete the terms of this order, new drafts will be forwarded to you and must be taken up not later than February 15, 1947.

Yours very truly,

s/ Francis J. Miller
Francis J. Miller

FJM:mr

296 Filed Oct 25 1948 Harry M. Hull, Clerk

UNITED STATES DEPARTMENT OF AGRICULTURE
Washington, D. C.
BEFORE THE SECRETARY OF AGRICULTURE
Fruit Processors, Inc., Complainant

v.

Lerman Brothers, Respondent
PACA Docket No. 4922

Preliminary Statement, Findings of Fact, Conclusions and
Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U. S. C., 1940 ed., 499a *et seq.*). The complaint states that a contract was entered into for the sale by complainant to respondent of designated quantities and packs of frozen red raspberries to be delivered f. o. b. cold storage. It is alleged that respondent accepted and paid for one shipment made under the contract, but that respondent refused to take delivery or pay for three additional deliveries of raspberries made to cold storage by complainant. Thereafter in order to mitigate damages complainant resold the merchandise which had been tendered for delivery. Reparation in the amount of \$14,610.55 is claimed, which sum is said to represent the difference between the contract price
297 of the produce delivered to cold storage by complainant and the net proceeds realized by complainant on resale of the merchandise.

A copy of the report of investigation was served upon the complainant on March 12, 1948. A copy of the report of investigation, together with a copy of the complaint, was served upon the respondent on March 10, 1948. At the same time, and as a part of such service, the respondent was notified by registered mail that failure to file an answer to the complaint within 20 days would be deemed

to be an admission of the facts alleged in the complaint. No answer has been filed. Accordingly, the case is disposed of on the basis of respondent's default.

Findings of Fact

1. Complainant, Fruit Processors, Inc., is a corporation whose post office address is 1207 Ann Street, St. Joseph, Michigan.

2. Respondent is a partnership composed of Harry Lerman, Samuel Lerman, and Myer Lerman, doing business as Lerman Brothers, whose post office address is 4th Street and Virginia Avenue, Southwest, Washington, D. C. At the time of the transactions herein complained of respondent was licensed under the Act.

3. On or about July 5, 1946, complainant and respondent, by its agent, the W. J. A. Dietrich Co. of Baltimore, Maryland, entered into a contract, in the course of interstate commerce, for the sale by complainant to respondent of the following described produce:

1500 cases, 12/2# (36,000 pounds) Frozen red raspberries, 5x1, at 39 cents per lb.

1500 cases, 24/16-oz. (36,000 pounds) Frozen red raspberries, 5x1, at 40 cents per lb.

600 cans, 30-pound tins, Frozen red raspberries, 5x1, at 35 cents per lb.

The total sale price of the three lots of raspberries was \$31,140, f. o. b. Chicago.

4. The contract of sale provided that delivery of the merchandise was to be made by complainant to the warehouse of Swift and Company at Union Stockyards, Chicago, Illinois, with the first month's storage and handling charges to be paid by the complainant and subsequent storage and handling charges to be paid by respondent.

5. The terms of sale were net cash, sight draft with warehouse transfer order attached, through the American Security and Trust Company, 7th and E Streets, Washington, D. C.

6. At the time of sale the 600 30-pound tins of frozen red raspberries were already in storage at the designated shipping point.

7. Respondent requested that red raspberries be packed in consumer containers. Upon being informed that complainant had only two-pound containers available, respondent volunteered to provide one-pound containers for one car if complainant would pack another carload in two-pound containers. Respondent thereafter caused a shipment of 240 cartons of one-pound containers to be
299 shipped to complainant. Shipping costs of \$148.20 on these containers were paid by complainant. Also, at the direction of respondent, complainant received two rubber stamps for imprinting the trade name "Froste" and the name of Respondent as Distributor.

8. On July 6, 1946, 600 tins of frozen red raspberries packed in 30-pound tins, in compliance with the terms of the contract, were shipped to respondent. These raspberries were accepted and paid for by respondent.

9. On July 10, 1946, complainant shipped from loading points in Michigan to the designated storage point 1,087 cases (34,784 pounds) of 16/2# frozen red raspberries in heavy syrup. Complainant's draft No. 378, for \$13,565.76, was drawn on respondent on the same date.

10. On July 12, 1946, 189 cases (6,048 pounds) of 16/2# frozen red raspberries in heavy syrup were shipped from loading points in the State of Michigan by the complainant to the designated delivery point. Complainant's draft No. 510 for \$2,358.72 was drawn on respondent on the same date.

11. On July 25, 1946, complainant shipped 718 cartons (17,232 pounds) of 24/1# frozen red raspberries in heavy syrup from loading points in the State of Michigan, to the designated point of delivery. Complainant's draft No. 550 for \$6,892.80 was drawn on respondent on the same date.

12. Respondent failed and refused to accept the deliveries tendered by complainant or to pay drafts 300 numbered 378, 510, and 550; whereupon after a reasonable time, and after demand for payment and notification to respondent that complainant would proceed to sell the merchandise delivered, the complainant did proceed to resell it.

13. The frozen red raspberries in one-pound and two-pound containers delivered by complainant to the warehouse of Swift and Company, at Union Stockyards, Chicago, Illinois, were resold by complainant to various purchasers. The net amount realized on said resales was \$9,138.12.

14. Storage charges totaling \$862.01, which accrued on the produce subsequent to the first month of storage and up to the time of resale, were paid by complainant to Swift and Company. Complainant paid insurance charges on said produce for the same period totaling \$69.38.

15. An informal complaint was received on March 28, 1947, which was within nine months after the cause of action herein arose.

Conclusions

In accordance with §47.8(c) of the rules of practice (10 F. R. 2212) respondent's failure to file an answer constitutes a waiver of hearing and an admission of the facts alleged in the complaint.

In this case complainant and respondent, by its agent, entered into a valid contract for the sale by complainant to respondent of various quantities and packs of frozen red raspberries, to be delivered f. o. b. cold storage 301 at Chicago, Illinois. One shipment under the contract was received and paid for by respondent. Three additional deliveries were made to storage by complainant, but respondent failed and refused to accept these shipments or to make payment therefor. It appears no

further deliveries were made by complainant under the contract. After notice to the respondent, the raspberries which had been delivered to cold storage were resold by complainant. Reparation is claimed for the difference between the contract price and the resale price, less expenses, of those berries which had been delivered to storage under the contract, or \$14,610.55, plus interest. It is concluded that respondent's failure and refusal to accept and pay for the three shipments in question were in violation of section 2 of the Act for which complainant should be awarded reparation in the amount claimed. The facts should be published.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$14,610.55, with interest thereon at 5 percent per annum from August 1, 1946, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties by registered mail or in person.

Done at Washington, D. C. this 19 day of August 1948.

/s/ Thomas J. Flavin
Judicial Officer

* * * *

302 Filed Oct 25 1948 Harry M. Hull, Clerk

On August 4, 1948, respondent filed a petition for reopening and reconsideration of this proceeding. The petition requests that the order signed by the Judicial Officer on July 7, 1948, which was entered upon respondent's default, be set aside, that respondent now be permitted to file an answer to the complaint, and that an oral hearing be granted on the issues of fact in the case.

Section 47.24 of the rules of practice (7 CFR, 1945 Supp., Sec. 47.24) provides that a petition for rehearing or reargument of a proceeding, or for reconsideration of an order, shall be made by petition to the Secretary filed with the Branch within 10 days after the date of service of the order; and that every such petition shall state specifically the matters claimed to have been erroneously decided and the alleged errors.

As evidenced by a signed receipt for registered mail contained in the file, the order of July 7, 1948, was served upon and received by respondent on July 8, 1948. Any petition in the proceeding filed pursuant to §47.24 of the rules should, therefore, have been filed not later than July 19, 1948. Although respondent's petition was not filed within the prescribed time, the Secretary has authority, pursuant to §47.25(b) of the rules, to extend the time for the filing of any document or paper required or authorized under the regulations if, in the judgment of the Secretary, there is good reason for the extension. The reason given for respondent's failure to file its petition within ten days after the service of the order of July 7, 1948, is that on July 9, 1948, the day after service of the order, Harry Lerman, the respondent-partner who was handling the matter, became seriously ill and was wholly incapacitated from engaging in his work. It is stated that he did not have an opportunity to notify the other partners of the entry of the reparation order until July 20, 1948, 303 by which time he had recovered sufficiently to return to his work, and that immediately thereafter respondent engaged counsel in the case. On the basis of these representations, the time for filing respondent's petition is extended; and the petition is entertained as though filed within the time prescribed by the rules.

Proceeding to a consideration of the merits of the petition, it is noted that respondent has not alleged that there is any irregularity or error in the issuance or con-

tent of the order of July 7, 1948, as based on the record in the proceeding. Respondent states that it has a meritorious defense, and the inference is that if this defense were presented the resulting order would differ from the existing order. What respondent is requesting is, in effect, permission to reopen the proceeding after default, on the grounds of inadvertence on the part of one of the respondent-partners.

The right of any party to reopen a proceeding after default is governed by §47.25 of the rules of practice. This section provides that a default in the filing of an answer may be set aside and the party in default allowed ten days within which to file an answer upon motion made within a reasonable time after the time for filing the answer has expired if, in the judgment of the examiner or the Secretary, as the case may be, after notice to and consideration of the views of the other party, there is good reason for granting such relief.

The petition alleges that respondent's default in the filing of an answer was due to the inadvertence on the part of one of the respondent-partners, Harry Lerman. It is stated that neither Myer Lerman nor Samuel Lerman had any knowledge of the pendency of the complaint. It is further alleged that Harry Lerman was not familiar with the regulations under the act and believed that certain telephone conversations he had with an official of the regulatory division and a letter thereafter addressed to that division on May 14, 1947, were a sufficient answer in the case.

As evidenced by a return receipt in the file, the formal complaint in this case was served upon respondent by registered mail on March 10, 1948. At the time and as a part of the service of the complaint, respondent was notified in writing that an answer should be filed by it within 20 days thereafter, and that failure to file an answer to the complaint would constitute a waiver of hearing on

the facts and would be deemed to be an admission of the allegations of the complaint. This notice clearly indicated the action to be taken by respondent if it did not agree with the allegations of the complaint, and the consequences of failure to take any action. The time for filing an answer expired on March 30, 1948, without an answer or
 304 acknowledgment of any kind having been received from respondent. Thereafter, on July 7, 1948, the Secretary's order was issued. On August 4, 1948, the respondent filed its petition to reopen and reconsider. The record thus discloses that more than four months elapsed between the last day for filing an answer and the date of filing of respondent's request to set aside the default. Without passing upon the question whether a motion to reopen after default may, under the rules, be granted after the entry of an order, we conclude that the four months which elapsed in this case between the time for filing an answer and the filing of respondent's petition is not a reasonable time within which to make application to reopen after default. We conclude further that respondent has not shown good cause why the default in this case should be set aside. For these reasons, respondent's request should be denied and the petition for reopening and reconsideration should be dismissed without service on the other party. The facts should be published.

Order

Respondent's petition for reopening and reconsideration, filed August 4, 1948, is accepted and considered as though filed within the 10-day period prescribed by the rules of practice for filing petitions for reconsideration.

Respondent's request that the order of July 7, 1948, be set aside, that respondent be allowed to file an answer, and that an oral hearing on the issues of fact be granted, is denied, and the petition for reopening and reconsideration is dismissed.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties by registered mail or in person.

Done at Washington, D. C., this 7th day of July 1948

/s/ Thomas J. Flavin

Judicial Officer

• • • • •

305 Filed Mar 14 1950 Harry M. Hull, Clerk

Pretrial Proceedings

STATEMENT OF NATURE OF CASE: Appeal from order of Secretary of Agriculture pursuant to Perishable Agricultural Commodities Act, (Title 7 - Section 499, et seq. U. S. Code Annotated). Petitioners claim that as wholesalers of frozen fruit products they negotiated to obtain a contract to buy frozen products, said negotiations being made with appellee through its agent, one, Dietrich; that on or about July 6th, a memorandum with respect to certain products was sent by said agent to petitioners and to appellee subject to approval as to price; that subsequently the products mentioned in the memorandum were delivered to a warehouse in Chicago, at which point plaintiffs requested an inspection by Dept. of Agriculture; that the appellee refused to permit the inspection and that petitioners refused to agree to buy.

Petitioners maintain the order of the Sec. of Agriculture that they pay, \$14610.55 plus interest at 5%, is erroneous and should be reviewed by this Court for the following reasons:

1. Petitioners did not violate the Act and are not guilty of unfair practices because there was no contract to buy any specific amount of frozen fruit and because the contract was subject to approval as to price, which price was not fixed by reason of appellees not permitting inspection.

2. In the alternative, petitioners maintain the contract was required to be in writing under Statute of Frauds.

306 3. That appellee's refusal to permit inspection of products constituted reasonable cause for petitioners not accepting merchandise.

4. That appellee, having claimed breach of contract in Aug. 1946, did not sell products within reasonable time and, therefore, failed in their legal obligation to mitigate damages.

Appellees maintain this petition for review was not filed within limitation of time fixed by Act; second, that since petitioners did not file an answer to the appellee's proceedings before the Secretary of Agriculture petitioners may not file this suit to attest findings of said Secretary of Agriculture.

Appellees rely specifically upon findings of fact made by the Sec. of Agric.

As to the merits otherwise, appellee maintains the agent, Dietrich, acted for both parties in the transactions and that negotiations through him matured into binding contracts; that said contracts specified the prices and were not subject to approval of prices as claimed by petitioners; appellee claims that the shipments of the merchandise were not to be made subject to inspection and, further, that inspection was available to petitioners at time of packing of products, if desired.

As to the claim that the contract must be in writing, appellee maintains there is no plea of the Statute of Frauds, further that the merchandise was specifically ordered by Dietrich, acting as agent for both parties, and further that there was partial performance of the contract by delivery and acceptance of the merchandise.

307 Appellee maintains that it took reasonable steps to dispose of the property; mitigation of damages, having repeatedly offered said property to petitions and having advised them when sales would be made.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

Parties stipulate that appellee will make diligent effort to obtain the presence of W. J. A. Dietrich as a witness in the trial of this case. Same stipulation as to David Beasley.

Parties stipulate that there is no written agreement in this case, except the Brokers' Memorandum, already introduced in the record before the Secretary of Agriculture.

Dated March 14, 1950

Pretrial Justice.

REMARKS of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

/s/ Carl W. Berueffy

Attorney for Plaintiff.

/s/ Leslie Garnett

Attorney for Defendant.

/s/ Bolitha J. Laws C. J.

• • • •

308 Filed May 19 1950 Harry M. Hull, Clerk

Findings of Fact and Conclusions of Law

This appeal from the decision and order of the Secretary of Agriculture came on to be heard upon the petition and pleadings, the decision of the Secretary of Agriculture, his certified findings of fact, conclusions and order in said cause, and the general denial of the appellants, and the Court, having considered the same and the evidence introduced at the trial and the arguments of counsel, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

The Court adopts the following findings of fact as certified by the Secretary:

1. Complainant, Fruit Processors, Inc., is a corporation whose post office address is 1207 Ann Street, St. Joseph, Michigan.

2. Respondent is a partnership composed of Harry Lerman, Samuel Lerman, and Myer Lerman, doing business as Lerman Brothers, whose post office address is 4th Street and Virginia Avenue, Southwest, Washington, D. C. At the time of the transactions herein
309 complained of respondent was licensed under the Act.

3. On or about July 5, 1946, complainant and respondent, by its agent, the W. J. A. Dietrich Co. of Baltimore, Maryland, entered into a contract, in the course of interstate commerce, for the sale by complainant to respondent of the following described produce:

1500 cases, 12/2# (35,000 pounds) Frozen red raspberries, 5x1, at 39 cents per lb.

1500 cases, 24/16-oz. (36,000 pounds) Frozen red raspberries, 5x1, at 40 cents per lb.

600 cans, 30-pound tins, Frozen red raspberries, 5x1, at 35 cents per lb.

The total sale price of the three lots of raspberries was \$31,140, f. o. b. Chicago.

4. The contract of sale provided that delivery of the merchandise was to be made by complainant to the warehouse of Swift and Company at Union Stockyards, Chicago, Illinois, with the first month's storage and handling charges to be paid by the complainant and subsequent storage and handling charges to be paid by respondent.

5. The terms of sale were net cash, sight draft with warehouse transfer order attached, through the American Security and Trust Company, 7th and E Street, Washington, D. C.

6. At the time of sale the 600 30-pound tins of frozen

red raspberries were already in storage at the designated shipping point.

7. Respondent requested that red raspberries be packed in consumer containers. Upon being informed that 310 complainant had only two-pound containers available, respondent volunteered to provide one-pound containers for one car if complainant would pack another carload in two-pound containers. Respondent thereafter caused a shipment of 240 cartons of one-pound containers to be shipped to complainant. Shipping costs of \$148.20 on these containers were paid by complainant. Also, at the direction of respondent, complainant received two rubber stamps for imprinting the trade name "Froste" and the name of Respondent as Distributor.

8. On July 6, 1946, 600 tins of frozen red raspberries packed in 30-pound tins, in compliance with the terms of the contract, were shipped to respondent. These raspberries were accepted and paid for by respondent.

9. On July 10, 1946, complainant shipped from loading points in Michigan to the designated storage point 1,087 cases (34,784 pounds) of 16/2# frozen red raspberries in heavy syrup. Complainant's draft No. 378, for \$13,565.76, was drawn on respondent on the same date.

10. On July 12, 1946, 189 cases (6,048 pounds) of 16/2# frozen red raspberries in heavy syrup were shipped from loading points in the State of Michigan by the complainant to the designated delivery point. Complainant's draft No. 510 for \$2,358.72 was drawn on respondent on the same date.

11. On July 25, 1946, complainant shipped 718 cartons (17,232 pounds) of 24/1# frozen red raspberries in heavy syrup from loading points in the State of Michigan, to the designated point of delivery. Complainant's draft No. 550 for \$6,892.80 was drawn on respondent on the same date.

311 12. Respondent failed and refused to accept the deliveries tendered by complainant or to pay drafts

numbered 378, 510, and 550; whereupon after a reasonable time, and after demand for payment and notification to respondent that complainant would proceed to sell the merchandise delivered, the complainant did proceed to resell it.

13. The frozen red raspberries in one-pound and two-pound containers delivered by complainant to the warehouse of Swift and Company, at Union Stockyards, Chicago, Illinois, were resold by complainant to various purchasers. The net amount realized on said resales was \$9,138.12.

14. Storage charges totaling \$862.01, which accrued on the produce subsequent to the first month of storage and up to the time of resale, were paid by complainant to Swift and Company. Complainant paid insurance charges on said produce for the same period totaling \$69.38.

15. An informal complaint was received on March 28, 1947, which was within nine months after the cause of action herein arose.

In addition to the above findings of fact, the Court makes the following findings:

16. The Dietrich Company was the joint broker for Lerman Brothers and Fruit Processors, Inc. The memoranda of sales were in writing and signed by the joint broker acting for both parties. The memoranda of sales were executed in triplicate by the broker, one copy thereof going to the seller, one copy to the buyer and the broker retaining one copy, as provided in the regulations of the Secretary of Agriculture.

17. Lerman Brothers received, accepted and paid for one shipment of frozen raspberries and one shipment of frozen cherries under the terms of the contract. This was a partial performance by Fruit Processors, Inc. and
312 acceptance by Lerman Brothers.

18. The fruit was specially frozen for the use of Lerman Brothers and packed in part in containers furnished by Lerman Brothers, who also furnished a rubber

stamp for affixing Lerman Brothers' brand and name on the packages.

19. The contract, being sight draft f. o. b., did not provide for inspection, but if, as claimed by Lerman Brothers, they had the right of inspection, the right existed for a reasonable time only after the notice of arrival of the goods at destination; and they neglected to make request for inspection within a reasonable time, which the regulations of the Secretary provide is six hours after delivery by truck. The request to inspect was not made by Lerman Brothers in good faith, but was, in fact, an afterthought.

20. The Court finds that Fruit Processors, Inc., not having used all of the containers furnished by Lerman Brothers for packing said fruit and having sold the remaining containers for \$632.62, Lerman Brothers are entitled to a credit of this amount on their indebtedness.

Conclusions of Law

1. While the Statute of Frauds is not specially pleaded, this transaction is not within the Statute of Frauds.

2. Lerman Brothers had no right of inspection at the time requested.

3. Lerman Brothers' failure and refusal to accept and pay for the three shipments in question were in violation of Section 2 of the Perishable Agricultural Commodities Act of 1930, 7 U. S. C. 1940 ed. 499a, et seq.

4. The Court finds for Fruit Processors, Inc. in the sum allowed by the Secretary of \$14,610.55, less \$632.62, or \$13,977.93, with interest thereon at 5% per annum from August 1, 1946 until paid.

An order will be entered in accordance with the foregoing Findings of Fact and Conclusions of Law.

/s/ F. Dickinson Letts
Judge.

• • • •

313. Filed May 19 1950 Harry M. Hull, Clerk

Judgment

In conformity with the Findings of Fact and Conclusions of Law herein, it is by the Court this 19th day of May, 1950,

ORDERED,

That the appellee, Fruit Processors, Inc., recover judgment against the petitioners, Harry Lerman, Samuel Lerman and Myer Lerman, in the sum of Sixteen Thousand Six Hundred Forty-three and 07/100 Dollars (\$16,643.07), being the principal of Thirteen Thousand Nine Hundred Seventy-seven and 93/100 Dollars (\$13,977.93), with interest thereon at 5% from August 1, 1946 until the date of this order; and that Garnett & Beach, attorneys for the appellee, Fruit Processors, Inc., recover judgment against said petitioners, Harry Lerman, Samuel Lerman and Myer Lerman, in the sum of Sixteen Hundred and Fifty and 00/100 Dollars (\$1,650.00), as attorneys' fees.

/s/ F. Dickinson Letts
Judge.

• • • •

319 Filed Jun 1 1950 Harry M. Hull, Clerk

Order Denying New Trial

On consideration of the motion filed by the petitioners for a new trial in this cause, it is by the Court this 1st day of June, 1950,

ORDERED, That said motion be, and the same is hereby, denied.

/s/ F. Dickinson Letts
Judge.

• • • •

320 Filed Jun 20 1950 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given that Harry Lerman, Samuel Lerman, and Myer Lerman, petitioners above-named, hereby appeal to the United States Court of Appeals for the District of Columbia circuit from the final judgment entered in this action on May 19, 1950.

338 *Civil Docket*

*District Court of the United States for the
District of Columbia*

Parties

1. HARRY LERMAN
 2. SAMUEL LERMAN
 3. MYER LERMAN
- Co-Partners t/a Lerman Brothers

v.

FRUIT PROCESSORS, INC.

Attorneys

Carl W. Berueffy

Bell & Ehrlich

1625 'K' St. N. W.

Myron H. Wolcott

Peoples State Bank Bld.

St. Joseph, Mich

Leslie C. Garnett & Samuel Beach

Tower Bldg.

Number 3851-'48

Action for Review • • • Under Perishable Agricultural
Commodities Act

<i>Date</i>	<i>Account</i>	<i>Rec'd</i>	<i>Disb'd</i>
1948			
Sept. 17	Berueffy	10 00	
" 30	Disb. to U. S. Treas		10 00
1950			
June 20	Berueffy	5 00	

334

*Civil Docket**District Court of the United States for the District of Columbia*

Date	Proceedings	Fees	Total
1948	Deposit for cost by	10 00	
Sept. 17	Complaint, appearance	filed	
" 17	Summons, copies (1) and copies (1) of Complaint issued		
" 17	Notice of Appeal (copies mailed to Chas. F. Brannon, Secy. of Agriculture)	"	
" 17	Undertaking of pltffs. in amount of \$29,221.10 with The Travelers Indemnity Co. as surety approved &	"	10 00
Oct. 8	App. Myron H. Wolcott as atty. for deft.	"	
" 8	Ans. of deft. to petition, certif. of service	"	
" 8	Calendared (N)		
" 25	Complt. with Exhibits 1 to 34 attached; preliminary statement; Finding of Fact & Conclusions & Order dated July 7, 1948, & order dismissing petition for re-opening & re-consideration dated Aug. 19, 1948—P. A. C. A. Docket #4922	"	
Nov. 8	Notice of petitioners of taking deposition of witness, W. J. A. Dietrich; cert. of service	"	
1949			
Jan. 25	Deposition of William J. A. Dietrich, published &	"	
Sept. 15	App. of Leslie C. Garnett & Samuel F. Beach attys. for deft.	"	
1950			
Mar. 14	Pretrial Proceedings	Laws, C. J.	

May	1	Hearing opened, testimony, respited until 5-2-50	Letts, J.	
"	2	Hearing resumed, testimony, arguments, respited until 5-3-50	Letts, J.	
"	3	Hearing resumed, Court finds for Fruit Processors Inc. (Counsel to present findings of fact, conclusions of law & Judgment)	Letts, J.	
"	19	Findings of fact & conclusions of law	Letts, J.	
"	19	Judgment for Fruit Processors, Inc. against petitioners in sum of \$16,643.07 & for Garnett & Beach atty. fees	Letts, J. (N)	
"	29	Motion of plttfs. for new trial, Notice, Cert. of Mailing 5-28-50		filed
"	29	Motion of plttfs. to stay execution, Notice, Cert. of Mailing 5-28-50		filed
June	1	Order denying new trial	Letts, J. (N)	
"	8	Stipulation between parties		filed
"	8	Order approving bond heretofore filed, as a supersedeas bond	Letts, J. (N)	
"	20	Notice of Appeal of plttf. (Copies mailed to Garnett & Beach & Sec. of Agriculture		filed
335	1950			
	June 20	Deposit by Carl W. Berueffy	filed	5 00
"	27	Designation of Record on Appeal of plttf. Cert. of Mailing 6-27-50	"	
July	21	Official transcript of proceeds, 5/1,2,3/50; pp. 1-239.	"	
"	24	Official transcript of proceedings, vol. 1 pp. 1-249; 5/1,2,3/50.	"	
"	24	Lerman's exhibits # 1, 2, 3, 4, 5, 6 & 7.	"	

On the second page it is contended that the petition for review was not filed within limitation of time fixed by Act of Congress; secondly, petitioners did not file an answer to the appellee's proceedings before the Secretary of Agriculture and may not file this suit to attest findings of the Secretary.

23 The Court thinks the Secretary in his order dismissing the petition for reopening and reconsideration indicates that in his judgment this was a proper case for exercising the authority of the regulation and there is no reason for believing his actions in that regard were arbitrary.

The Court thinks the case must proceed.

MR. BERUEFFY: At this time I ask leave of the Court to file the original tendered to the Secretary of Agriculture as a part of the record in this case
24 on the ground that this Court has full authority to allow any amendments which permit us to arrive at the justice of the case, and in this case the filing of the answer as tendered to the Secretary of Agriculture could be permitted as an amendment, and would permit us to proceed on the issues in this case, as to which the Fruit Processors, the complainant before the Secretary of Agriculture, has been fully advised at the pre-trial. In other words, we stated to them at pre-trial what our answer and what our defenses were and the Court at that time did not require actually that there be an answer actually filed, but I think Colonel Garnett will bear me out.

28 THE COURT: Well, your request will be denied, and the Court will regard the position of the complainant here as including an implied general denial. The Court is doing that in part because the proposed answer now does present an affirmative defense.

* * * *

30 MR. GARNETT: If Your Honor please, we stand on the findings of the Secretary.

MR. BERUEFFY: If Your Honor please, just so I may understand, are you offering the record?

MR. GARNETT: I am offering the record. It is already in evidence. I don't know whether I have to offer it, but if I do, I do offer it.

THE COURT: It will be regarded as received in evidence.

* * * *

Charles A. Elder

* * * *

Direct Examination

BY MR. BERUEFFY:

Q Will you please state your name? A Charles A. Elder.

31 Q Where do you live? A St. Joseph, Michigan.

Q What is your occupation? A General manager, Fruit Processors, Inc.

Q Fruit Processors, Inc., is the claimant in this case? A It is.

Q In your duties as general manager did you have supervision of the affairs which concern this case here? A I did.

Q Did you have any direct dealings with any member of the partnership known as Lerman Brothers? A I did not.

Q What is the business of Fruit Processors, Inc., Mr. Elder? A We take fruit in season, prepare it by washing and grading, and pack it into containers to be frozen.

Q Are you exclusively processors of frozen fruits? A Yes.

Q In other words, no canning? A We do very little canning. Some juices is all.

Q Is the processing of fruit a regular part of your business, Mr. Elder? A It is.

Q How long has Fruit Processors been engaged
32 in the business of preparing frozen foods? A Since August, 1943.

Q Was that a new company organized on that date? A It was organized as an independent.

Q Did it succeed to the business of any other company? A No.

Q How long have you been in the frozen food business, Mr. Elder? A Since 1935.

Q Since 1935? A Yes, sir.

Q And prior to being with Fruit Processors, Inc., by whom were you employed? A I was employed by the Barium Company Cooperative Fruit Exchange.

Q Where is that located? A Stevensville, Michigan.

Q Is that in the same general area as St. Joseph? A Yes, it is.

Q Since the organization of Fruit Processors, Inc., have they regularly packed frozen raspberries? A Yes, sir.

Q Are they still engaged in the business of packing frozen raspberries? A Yes.

Q Calling your attention to the year 1946, when
33 did the packing season for red raspberries in the St. Joseph, Michigan, Area, begin in that year? A Approximately the first of July.

Q How long did that packing season last? A Until the 25th or 28th, around there. I am not exactly certain of the date.

Q The best part of July? A Of July, yes. That is, on the raspberry pack.

Q In addition to raspberries, of course you processed other fruit? A That is true.

Q Do you process any vegetables, or just fruit? A Just fruit.

* * * *

Q Prior to 1946, had you ever had any dealings with Lerman Brothers? A No, sir.

Q After July of 1946 did you ever have any dealings with Lerman Brothers? Did you ever have any
34 dealings after July, 1946?

MR. BEACH: You mean by selling their packed goods?

THE WITNESS: There were no more.

MR. GARNETT: Sales.

THE COURT: No, after July, would that exclude or include the shipment here? When was this?

MR. BEACH: July, sir, of 1946, I think this occurred.

MR. BERUEFFY: Yes. Unless there be a mistake about it, my intention was to include the period before and after the matters here in suit.

BY MR. BERUEFFY:

Q Now, in July of 1946, there was a transaction involving some fruit which was subsequently shipped to Lerman Brothers, is that correct? A It was not shipped to Lerman Brothers. It was a transaction involving some fruit with Lerman Brothers.

Q Was that fruit ever shipped anywhere? A To the cold storage.

Q And what cold storage was it? A To the Swift & Company cold storage.

Q Now, Mr. Elder, can you tell us the approximate date of the shipments that were made to the cold storage house?

* * * *

35 THE WITNESS: I can give the approximate date on certain of the packages, beginning July 10. There were some, I think, prior to that of 30-pound cans, but I would have to refresh my memory of the date on that.

* * * *

36 MR. BEACH: Can you tell from examining the record, Mr. Elder, what goods were involved in the suit?

THE WITNESS: The goods involved are some 20-pound cans of cherries and 30-pound cans of raspberries and then some 1 and 2-pound packages of red raspberries.

BY MR. BERUEFFY:

Q The only goods involved in this suit are the 2-pound and 16-ounce packages of red raspberries? A They are the unpaid portion of the order.

Q Calling your attention, Mr. Elder, to Exhibit No. 7, and Exhibit No. 9 in the Secretary's record, that purports to be a warehouse receipt from Swift & Company at Chicago, Illinois.

* * * *

37 Q Can you tell by looking at that record how many pounds of raspberries were shipped on that shipment? A Yes, sir.

Q How many was it? A 542 cartons containing 16 2-pound packages.

Q So that in pounds that would be 32 times 542, is that correct? Would you check my multiplication? I get 17,344 pounds.

* * * *

THE WITNESS: I have 17,344 pounds.

MR. BERUEFFY: 17,344? All right.

THE COURT: Is that what you got?

MR. BERUEFFY: Yes, sir.

* * * *

Q Now, Mr. Elder, how long does it take for goods to be in transit from St. Joseph, Michigan, to Chicago?

A About four hours.

Q About four hours? A Yes, sir.

38 Q So that this receipt is dated July 9, 1946.

Would it be your impression those were probably shipped out of your plant on that day? A Yes, it would.

Q And was that merchandise already packed when you—when the transaction with Mr. Lerman took place? A This on Exhibit 9, you mean?

Q Yes. A No, that was not packed.

Q When was it packed? A That would have been packed the day it was shipped to Swift & Company.

Q That is, to the best of your recollection that amount was packed on July 9, 1946? A Yes.

Q Now, calling your attention to Exhibit No. 10, which—

* * * *

Q That purports to be a warehouse receipt for 579 cartons of 2-pound raspberries? A Yes, sir.

39 Q Calling for 17,528 pounds?

* * * *

THE WITNESS: It shows here 17,528, whereas it is actually 18,528.

* * * *

Q And that merchandise purports to have been delivered to the warehouse on July 10? A Yes, sir.

Q Now, when would you say that merchandise was packed, Mr. Elder? A Presumably on July 10. We moved it immediately.

Q In each case it was moved out as fast as it was packed, is that it? A That is true.

Q Calling your attention to Exhibit 11, that purports to be a warehouse receipt for 4,928 pounds of 2-pound red raspberries? A Yes, sir.

Q Received for storage on July 11, 1946? A Yes, sir.

Q And would you say that was packed on or
40 about July 11? A Yes, sir.

Q Now, calling your attention to Exhibit 12, that again is a warehouse receipt to Swift & Company? A It is.

Q And that purports to represent a total of 17,232 pounds of raspberries, 1-pound cartons? A It does.

Q And when was that merchandise packed, to the best of your knowledge? A Apparently on the 16th and 17th of July.

* * * *

41 MR. BERUEFFY: Now, this has been marked Lerman Exhibit No. 1 for Identification.

BY MR. BERUEFFY:

Q Do you recognize that, Mr. Elder? A I do.

Q What is it? A It is a copy of an order issued for cases, 1,500 cases of 2-pound and 1,500 cases of 1-pound red raspberries.

Q By whom was that order issued? A W. J. A. Dietrich Company.

Q Of Baltimore? A Of Baltimore.

MR. GARNETT: What is the date of the order?

THE WITNESS: The order is July 5, 1946.

* * * *

42 MR. BERUEFFY: I might pass this for a moment, because I will call Mr. Dietrich later and he can identify it. Those shipments which you made to Swift & Company on July 9, 10, 11, 16 and 17 were
43 in fact a part of the cherries called for by—

THE COURT: Not cherries?

MR. BEACH: Raspberries.

MR. BERUEFFY: Raspberries. I am sorry.

BY MR. BERUEFFY:

Q Of the frozen raspberries called for by this order which I have just shown you, Lerman Exhibit No. 1? A They were.

Q Did that represent all of the raspberries called for by that order? A No, sir.

Q How many pounds of raspberries would 1,500 cases of 12's, 2-pounds, represent?

◆ ◆ ◆ ◆ ◆

44 THE WITNESS: That would be 36,000 pounds
of each item.

BY MR. BERUEFFY:

Q Now, did you ever notify Lerman Brothers that these raspberries covered by the Exhibits 9, 10, 11 and 12 had been shipped to the warehouse in Chicago? A The notification—my answer is yes.

Q When did you notify them? A At the time the invoice and drafts were prepared.

Q Can you state that any more— A On the dates that you just listed here, of the dates of those—

• • • • •

Q Just the 1- and 2-pound packages. A Those three dates, then, would be.

45 Q 10, 12 and 25? A Yes.

.....

Q Mr. Elder, I hand you what has been marked Ler-
man Exhibit 2 for Identification and ask you to tell me
what that is? A That is a similar order for 600 cans
of 30 pounds frozen red raspberries.

Q What is the date of that one? A That is July 11.

MR. GARNETT: That is all shown on Exhibit 1, third page of Exhibit 1.

BY MR. BERUEFFY:

Q Now, so far as Exhibit 1 is concerned, Mr. Elder, you didn't receive Exhibit 1 as one paper? You received it as two papers, did you not? A I think that is correct.

* * *

46 Q Now, Mr. Elder, will you look at Lerman Exhibit No. 2? That purports to cover the 30-pound tins of raspberries? A Yes, sir.

Q What is the date on that? A July 11, 1946.

Q Is that when you received the order for the 30-pound cans of raspberries? A No, sir.

Q When did you receive the order? A Somewhere around July 5.

* * *

48 Q Can you tell the Court why Mr. Dietrich would have split these up and put them on two different dates six days apart if they had been part of the same order? A Yes. We pack a different type of packages and different varieties of fruit at different times, and the brokers will split the order on the written statement, so that when it comes to files, and there is correspondence on that particular item, other items don't have to be held as back orders.

Q At the time that the 30-pound cans of frozen raspberries were ordered, were they all packed? A I think so.

Q You had those packed and in your warehouse? A That is true.

Q Do you know what warehouse they were in? A They were in Swift, I am sure. I would have to refer to the record. They were in Chicago, in Swift's.

Q Would it refresh your recollection, Mr. Elder, if you will look at that, which seems to indicate that they were in the G. H. Hammond Cold Storage Company in Chicago, Illinois? What was your answer to that? A They were in Chicago.

Q And were they in the G. H. Hammond Company Cold Storage?

* * *

50 Q Now, Mr. Elder, would you just look at this piece of paper I am handing you that purports to be a photostatic copy of an invoice from Fruit Processors, Inc., St. Joseph, Michigan? A Yes.

Q Do you recognize it? A I do.

Q That is an invoice covering 30-pound cans of raspberries, is it not? A Yes.

Q And those are the raspberries that were shipped and accepted by Mr. Lerman? A They were.

Q That invoice shows they were at the G. H. Hammond Cold storage house? A Yes.

Q Does that record refresh your recollection? A That would be in the G. H. Hammon Company, then.

Q How did you ship those to Mr. Lerman? A They were sold to Mr. Lerman at the warehouse, and then, when that car moved forward it was a split car, part of them going to another buyer and unloaded, and
51 the balance of them delivered to Mr. Lerman.

Q At the time those raspberries left Chicago, they left by the authority of the Fruit Processors, isn't that right? A I must check on that to see whether we did give them the release or not.

* * *

Q At the time these raspberries were ordered out of storage, you issued a sight draft, did you not? A Yes, sir.

Q And you sent that to the American Security Bank in Washington? A I am not sure whether it was the American, unless I can find those papers.

* * *

52 Q Well, in any event, Mr. Elder, that sight draft was paid, was it not? A It was.

Q And then later 1 and 2-pound packages of raspberries were shipped to Chicago, is that right? A Yes. I am—that was right.

Q On this order, on this transaction which involved the 1 and 2-pound packages, your company had 2-pound containers, did it not? A We had 2-pound containers.

Q And you were packing frozen raspberries in 2-pound containers in your regular business? A We were not.

Q But you did have containers? A We had.

Q You had packed such raspberries? A Never.

Q Never? A Never.

Q Now, Mr. Elder, calling your attention again to Lerman Exhibit No. 1, that called for these raspberries to be f. o. b. Michigan, did it not? A Yes, sir.

53 Q And what was meant by that, St. Joseph, Michigan? A Yes, St. Joseph.

Q I believe you said in the first of your testimony that you never talked to Mr. Lerman yourself? A No.

Q So that you would not be able to say you said that these frozen raspberries were to go to the Swift & Company warehouse in Chicago, would you? A Yes. I said it.

Q You said that? A Yes.

Q And why did you send them to Chicago? A Because of lack of cold storage space, other than in Chicago. Very much of our pack was moving in there.

Q I see. Did you ever receive personally instructions from the Lermans to send this to Chicago? A No.

Q Did you ever notify the Lermans you were sending them to the Chicago warehouse? A Only with the drafts.

• • • •

54 Q Relating only to your personal knowledge, now, Mr. Elder, do you know of any other notice that the Lermans had these raspberries were in Chicago, of your own personal knowledge? A Mr. Beasley's conversation with Lerman on the phone.

* * *

55 Q You did hear the telephone conversation? A I did.

Q Did you hear both ends of the conversation? A I did not.

Q Where did that conversation originate? A In my office.

Q And which side of the conversation did you— A Mr. Beasley's.

Q And when was that conversation, Mr. Elder, as far as you can tell after July 5?

In other words, the same day as the order which I have shown you, which is marked Lerman No. 1 for Identification? A Yes.

Q Was that the only conversation you heard Mr. Beasley have with Mr. Lerman about these raspberries? A Yes.

Q That was on July 5 and was subsequently reduced to this memorandum of the W. J. A. Dietrich Company, was it not? A To the several memorandums.

Q And in that you heard Mr. Beasley say these raspberries would go to Chicago? A Yes, sir.

Q Now, subsequent to this, Mr. Elder, were you informed that an inspector for the United States Department of Agriculture had been instructed to inspect these raspberries? A No.

* * *

Q Mr. Elder, I show you two sheets of paper which have been marked Lerman No. 3 for Identification. It appears to be a telegram. A Is this a continuation?

Q Yes, as far as I know. A Yes.

Q And that telegram appears to be signed with your name? A Yes.

Q Do you recall having sent that telegram? A I do.

Q And in that telegram you refused to permit inspection? A I did.

Q Of this merchandise? A Yes.

* * * *

57 Q So that prior to sending this telegram, Mr. Elder, you had been informed Mr. Lerman had requested an inspection by the Department of Agriculture?

* * * *

THE WITNESS: This telegram was in reply to a request.

* * * *

Q For an inspection by the United States Department of Agriculture, isn't that correct? A By Lerman.

Q On Lerman's behalf? A Yes.

Q But that inspection was to be made by the official inspectors under the Inspection Service, was it not? A I don't recall that.

Q While these raspberries were in that warehouse, they were completely subject to your control, is that right? A Not after the draft papers had moved forward with the transfer order attached.

Q The only way Mr. Lerman could get those was
58 by paying the sight draft, is that correct? A Correct.

Q Until the sight draft was paid, you remained in control of these raspberries in the warehouse, didn't you? A Except when that paper left our hands. It was then out of our control.

Q So that when Mr. Lerman requested an inspection, the warehouse couldn't grant that inspection without

your consent, is that correct? A That is right, until they had proven ownership.

Q Yes. I understand that, until the sight draft had been paid and the transfer order came in? A Yes.

59 Q Do you know of any conclusion with respect to grading of frozen raspberries, Mr. Elder?

THE COURT: As of that date?

MR. BERUEFFY: As of that date.

THE COURT: In 1946?

THE WITNESS: Yes.

BY MR. BERUEFFY:

60 Q What was the conclusion? A Where inspection was specifically requested, the custom was to permit buyers to place their representatives into the plant to inspect it as packed.

A There were no grades established.

Q There were no established grades? If a man simply ordered frozen red raspberries, what was the conclusion with respect to the kind or quality of raspberries that had to be delivered. A The only condition we gave was that they would meet the approval of the Pure Food, Drug and Cosmetic requirements.

Q That was not expressed on your memorandum? A That is implied in all packs.

Q Now, Mr. Elder, were you licensed under the Perishable Agricultural Commodities Act? A We were.

61 Q And you were, of course, familiar with the regulations of the Secretary with respect to transactions under that Act? A Yes.

Q And this sale was f. o. b. Michigan or f. o. b. Chicago? A F. o. b. Michigan, the storage in Chicago.

Q That was the only provision as to the shipment of these raspberries, was it not? A Yes.

Q Now, on August 7, Mr. Elder, according to this telegram, you notified Lerman's if these drafts were not paid August 8 you would sell the merchandise at the best price possible, did you not? A We would recall the drafts and sell the merchandise and hold them responsible.

Q Were these drafts paid? A They were not.

Q And you did recall them? A We eventually recalled them.

Q And when did you sell the merchandise, Mr. Elder? A During the following winter attempts were made and some small sales were made, final disposition coming as shown in one of these invoices, up to approximately August 5, 1947.

Q The last of the merchandise was sold about a year later? A That is true.

* * * *

62 Q Did the Department of Agriculture advise you to sell this merchandise? A They had advised me I must establish the amount before a formal complaint could be entertained.

Q And when did you get this advice from the Department of Agriculture, approximately? A Approximately within the nine months period described.

Q That would be nine months from August? A I think that is the time. It was in the spring of 1947.

Q And it wasn't until after that advice that you sold the most of this merchandise, is that correct? A That is correct.

Q And at what price did you sell the most of
63 this merchandise? A At 15 cents a pound.

* * * *

Q * * * Just explain to the Court how from this exhibit we can calculate the pounds that were sold and the dates. You said by referring to the exhibit? A 2?

Q To Exhibit 26, which is a summary of the sales, is that correct? A Yes.

Q And Exhibit No. 2 refers back to an exhibit, and that shows the sale on a certain date at a certain price, is that correct? A Yes.

Q And so on down the line to Exhibit 8. What
64 was the earliest date on which you made any effort to sell any of this merchandise? A I think it was about August 10 or 11 of 1946.

Q 1946? Do you recall what the condition of the market was on August 10 or 11? A It was very much confused.

Q It was very confused? Now, Mr. Elder, the 30-pound tins represent the institutional size in the frozen raspberry business, don't they? A Yes.

Q Institutional size? A Institutional size.

Q And the 2 and 1-pound packages are consumers' packages? A They are.

Q And based on your knowledge of the business, is there a differential between the prices of those two kinds of packages? A Yes.

Q Which is the highest price pack? A The smaller sized package.

Q And how much would the differential ordinarily be between the smaller package and an institutional package? A Anywhere from several cents a pound to ten cents.

Q That is, the smaller packages might run as
65 much as ten cents a pound higher?

* * * *

THE WITNESS: I am not an expert on the consumers' pack and the price thereof.

BY MR. BERUEFFY:

Q You do know from your experience they run somewhat higher? A Yes.

* * * *

66 Q Mr. Elder, in July of 1946 there was a very strong demand for frozen raspberries, isn't that right? A There was.

Q As a matter of fact, that applied to all frozen foods, did it not? A It did.

Q Subsequent to that date, the price of raspberries and other frozen foods declined, did it not? A Yes.

Q Calling your attention to the opening price for the 1946 pack of red raspberries, what was the price of institutional size cans? A Around 35, 37 cents a pound.

Q Now, do you know what the price in November was for that same size can? A Very much what you could get.

Q Is there any publication which sets forth quotations for various kinds of frozen merchandise?

67 A Yes, I think certain trade journals attempt it.

Q There is a magazine, is there not, called Quick Frozen Foods? A There is.

Q Are you familiar with that magazine? A We subscribe to it.

Q Do you read it? A Certain parts of it.

Q Does it have market quotations in it? A I think it has.

Q From your own experience could you tell the Court whether those are accurate market quotations or not?

A They are a fair estimate. The prices are so changeable.

Q I call your attention to a magazine, which is the November, 1946, issue of Quick Frozen Foods, and on page 106 I call your attention to an item called red raspberries.

• • • •

68 Q Have you read that? A Yes, I have.

Q Could you tell us what the price of the institutional pack of frozen red raspberries was in November, 1946? A No.

• • • •

Q And the same would apply to practically any month during the year following August, 1946? You wouldn't recall what the price in January, 1947, was? A There was no established price. The bottom was going out.

Q The price was declining, is that right? A Sir?

Q The price was declining? A Yes.

Q You, yourself, sold some of these raspberries at 39 cents a pound in November, did you not, Mr. Elder? A There would be a record here.

Q Those are accurate? A No.

* * *

MR. BERUEFFY: We have found it, if Your Honor please, Exhibit No. 39, that on November 13 you made a sale of raspberries at 39 cents a pound in these 2-pound packages, does it not?

THE WITNESS: It does.

BY MR. BERUEFFY:

Q And Exhibit 4 shows on March 6, 1947, you sold some of these raspberries at 33 cents a pound? A Two cases.

Q By March the price of these raspberries had dropped six cents a pound, is that right? A For what I was able to sell.

* * *

Q You never received any document signed by Mr. Lerman in connection with the 1 and 2-pound raspberry transaction, did you? A No.

Cross-Examination

BY MR. GARNETT:

Q From whom did you receive your containers?
70 A Who did I receive them from?

Q Any containers, yes. A They were from the Lerman Company.

Q Did you receive any stamp to put the name of Lerman Fruit on those goods? A I did.

Q Have you got that stamp here? A I have it in my brief case.

Q Can you tell the Court from memory— A No.

* * *

Q You received those stamps? A I did.

* * *

71 Q How did you get those stamps? A They came in the mail.

Q How did you get the containers? A They were shipped by truck.

Q You did not order those stamps? A I did not.

Q Did your company authorize Mr. Lerman to order either the containers or the stamps? Has your company authorized Lerman? A No.

Q Had you ever had any dealings with the Lerman Brothers before? A I couldn't hear you.

Q From whom were these orders received, from Lerman Brothers? A From the Dietrich Company.

Q From the Dietrich Company? Did you approach the Dietrich Company to sell this stuff? A No, we did not.

Q As a matter of fact, it was a seller's market, wasn't it? A It was.

Q You did not solicit orders from anybody? A I did not.

Q You had more orders than you could fill? A I had.

Q These orders were presented to you by Mr. Dietrich? A They were.

* * *

Q Who actually from Mr. Dietrich's office dealt with you? A Mr. Dietrich.

Q Where? A At my office in St. Joe.

Q He came to your office? A He did.

Q You took the orders from him in your office?
73 A I did.

Q Did you take them all on the same day? Did Mr. Beasley call Mr. Lerman in your presence to authorize this transaction? A He did.

Q After this telephone call you entered into a sale through Mr. Beasley to Mr. Lerman? A I did.

Q The contract called for 1,500 cases of 2-pound frozen red raspberries, and 1,500 cases of 16-ounce frozen red raspberries? A That was our written confirmation of it.

Q And there were 600 tins of frozen red raspberries? A There were.

Q That 600 tins of frozen red raspberries was already frozen, at the time, July 5, when Mr. Beasley came to your office? A They were.

Q Those 600 cans were shipped July 11 and paid for by draft? A They were.

Q Do you know whether or not they were paid for by draft through the Liberty National Bank or the American Security National Bank? A The Liberty National Bank.

74 Q Do you recall what that draft amounted to in dollars and cents? A Around \$6,300, \$6,800.

Q \$6,300, I think it was. A \$6,300.

Q Mr. Elder, I invite your attention to Exhibit 31. It is a telegram. It is found in the record of the Secretary of Agriculture, a telegram dated July 23, 1946, to the Fruit Processors, Inc., from the Dietrich Company, "Retel 22nd Lerman's draft cherries paid other being paid tomorrow."

At that time had the 600 cans of red raspberries been paid for? A They had.

Q How many cherries did you sell them? A A car-load, about \$10,000.

Q \$10,000 worth of cherries? A Yes, sir.

Q Was that draft paid on July 24? This was paid before July 23. A It was paid about July 23. I think it was about July 23.

Q Let me get this straight. On the 16th of July Lerman paid for the 600 cans of frozen raspberries which had been ordered July 5, together with the rest of the stuff? A That is right.

75 Q On July 23 paid \$10,000 for the cherries which had been ordered at the same time? A Yes.

Q Mr. Elder, Mr. Berueffy has interrogated you about Exhibit 32, which is your telegram to Lerman on the 7th of August. At that time the market had smashed, the price of the stuff had gone down? A It was—yes, it was.

Q When did you receive from him any request for inspection? A I would say the 6th. This was the direct reply.

Q At that time the bank down here was holding three drafts from you, as I understand it, one dated July 10 for \$13,565.76, for goods you put in storage for them, July 12, \$2,358.72, goods you put in storage for them, and on July 25, \$6,892.80? A Yes.

Q On the 7th of August, had those drafts been returned? A No.

Q They were still held by the bank here for Lerman? A They were.

.

76 Q At the time you sent that telegram, had you not been advised by Mr. Dietrich he was promising to pay those drafts? A I had been.

Q And he did not do it? A He did not.

Q And your telegram notified him unless he paid those drafts by the close of business on the 8th you were going to have your bank recall them? A That is right.

Q Did he make any reply? A No.

Q I asked you before, I don't recall your statement, when did he ask for the inspection of these goods? A Right before—that was on August 6 or thereabouts.

Q And you replied to it on August 7? A That we wouldn't allow it.

Q That you wouldn't allow it? In what way did that request come to you? A By phone.

Q By phone from whom? A From Mr. Dietrich.

Q From Mr. Dietrich? At that time not only had the drafts been unpaid from the 25th of July, the three drafts, the last of which was the 25th of July, but the market had dropped? A Yes.

Q What effort did you make to dispose of these raspberries after August 8 or August 10? A We asked our brokers representing us throughout the country to sell them.

Q Did you contact any of your big customers?
78 A Yes, we did.

Q Can you name some of them? A We contacted Mitchell Syrup, in Detroit, Kroger Baking Company in Cincinnati, and Squire-Dingley Company in Chicago.

Q Wrigley? A Wrigley, in Detroit.

Q Did Mr. Dietrich or Mr. Beasley sell any of them for you? A They did.

Q As a matter of fact, you were trying to save everything out of the wreck you could, weren't you? A We were trying hard.

Q What was the demand for the especially packed 1 and 2-pound boxes of frozen raspberries, after the market—the Judge can't hear you. You have your back to him. A There was no demand.

Q Those packages were especially packed for this order? A They were, and especially that type of package.

Q And in the packages furnished by the buyer? A That is true.

Q It was considerably easier to sell the institutional goods? A Yes.

Redirect Examination

BY MR. BERUEFFY:

Q At what price did you offer this merchandise to the Wrigley Company, Mr. Elder? A To the Wrigley Company?

Q Yes.

MR. GARNETT: It is stated in the record.

MR. BERUEFFY: I don't think so.

MR. GARNETT: I think it is. I might be mistaken, but I haven't been yet. There is a note of the sale to the Wrigley Company here.

THE COURT: Do you remember?

THE WITNESS: They were sold for 15 cents to the Wrigley Company.

BY MR. BERUEFFY:

Q When did you offer them to the Wrigley Company? A We made offers through these brokers immediately upon taking back the papers in August, 1946.

Q And in August of 1946, at what price did you offer these raspberries to the Wrigley Company?

MR. GARNETT: Look at Exhibit No. 6, 17 cents.

80 BY MR. BERUEFFY:

Q That sale was July 8, 1947, was it not? A That is right.

Q I believe your testimony was you offered these raspberries in August of 1946? A We did.

Q To that company? A Through the brokers, offered all these.

Q At what price did you offer them in August, 1946? A We tried to get 40 cents a pound.

Q Did you ever offer them at less than 40 cents a pound? A Yes.

Q When was it that you offered them for less than 40 cents a pound? A In August, and thereafter.

Q How much less than 40 cents a pound did you offer them for? A We offered them for 35 and for 30 and for 25, and then 20, as the time progressed.

Q As a matter of fact, in November you were able to sell some of these raspberries at 39 cents a pound, weren't you? A Yes, a few.

MR. BEACH: Is that November, 1946?

81 MR. BERUEFFY: 1946.

BY MR. BERUEFFY:

Q When you offered these raspberries for sale, Mr. Elder, did you do anything more than notify your brokers you had some 1 and 2-pound pack raspberries at 40 cents? A Yes. I had some of them even take samples out to display.

Q But you were not able to sell on the basis of the samples, is that correct? A We just weren't able to sell.

Q Mr. Elder, this final draft was mailed from you on July 25, wasn't it? A Yes.

Q It was mailed by regular mail by your bank? A I presume so.

Q So it would have arrived in Washington toward the end of the month, is that right? A I presume so.

Q And then the bank here in Washington had to notify Lerman Brothers the draft was there, is that right? A That is usual.

Q You were notified sometime in the early part of August Mr. Lerman wanted to have this inspection? A Yes.

82 Q And you refused to permit that inspection? A I did.

* * * *

THE COURT: Did you ask why they wanted the inspection.

THE WITNESS: No.

BY MR. BERUEFFY:

Q You just refused it? A Right.

Q Now, calling your attention to Lerman's Exhibit 1, that was the only written document covering the 1 and

2-pound raspberries that was ever made out, isn't it? A Yes.

Q Would you tell us what S. A. P. means, Mr. Elder?

A That is subject to approval as to price.

Q Whose approval as to price? A That is the buyer's approval as to price.

Q If he doesn't approve the price, he doesn't have to take it, is that correct? A In the normal procedure.

Q That is what the term means to the trade, isn't it? A It does.

Q Mr. Elder, is this your signature on the complaint to the Secretary of Agriculture? A It is.

83 Q And you swore to that complaint before a Notary Public in your county? A Yes.

Q In this complaint, do you remember, can you tell us who signed it? A I am sure I did.

Q In your complaint, Paragraph 4, the following language appears:

"That on or about the first day of July, 1946, in the course of interstate commerce, complainant, by contract in writing, sold to the respondent 36,000 pounds of frozen red raspberries in heavy syrup packed in 1-pound containers at the agreed price of \$0.40 per pound, and 36,000 pounds of frozen red raspberries in heavy syrup packed in 2-pound containers at the agreed price of \$0.39 per pound, * * *"

Did you sign that complaint with that statement in it?

A I signed it.

* * * *

84 Q There never was any other paper signed by Mr. Dietrich, was there, than this? A Not of that type.

Q Relating to these raspberries? A No.

Q There never was a paper signed by any member of the Leman Brothers partnership, was there? A Not that I have seen.

Q You would know, wouldn't you, Mr. Elder? On what instrument or writing did you base your statement in paragraph 4 of this complaint to the Secretary of Agriculture?

MR. GARNETT: I object to that. I don't think it is material.

THE COURT: Sustained.

MR. BERUEFFY: If Your Honor please, I offer to prove by this question that the judgment of the Secretary of Agriculture was obtained on the basis of this complaint and therefore since no paper ever existed of that kind, the judgment is obviously not sustained by the record, and therefore should be reversed.

* * * *

85 Q Now, you were asked, Mr. Elder, about the cartons which came to your plant, the 1-pound cartons. A Yes.

Q You already had the 2-pound cartons? A That is right. We did.

Q Nobody representing Lerman's had anything to do with the 2-pound cartons? A In what way?

86 Q In securing them? A No, we had them.

Q Do you know where the 1-pound cartons came from? A Yes.

Q Where? A Johnson City.

MR. GARNETT: Tennessee.

BY MR. BERUEFFY:

Q From Harman down there? A That is right.

Q You have no personal knowledge as to who told Mr. Harman to ship those cartons? A No.

Q As a matter of fact, the stamps you have referred to came also from Johnson City, did they not? A No.

Q They didn't? A No.

* * * *

87

Recross Examination

BY MR. GARNETT:

Q Was there an agreed price for both the 1,500 cases, the 16-ounce and the 2-pound raspberries?

MR. BERUEFFY: I object, unless there is an agreed price in writing. I object.

BY MR. GARNETT:

Q Was there an agreed price in writing signed by Dietrich? A Not on that order.

Q Was there an agreed price? A There was.

* * * *

Redirect Examination

BY MR. BERUEFFY:

Q When you answered Mr. Garnett's question, did you mean an agreed price orally or in writing? A Orally.

88 Q Who made that oral agreement? Who was participating in that oral conversation? A Mr. Beasley and Mr. Lerman.

Q Did you hear Mr. Lerman agree to that conversation? A I was not on the phone.

Q I see. So you heard Mr. Beasley say the price was 40 cents a pound? A Yes.

Q Wasn't it at 39 cents a pound for the 2-pound raspberries when they came in? A I merely reduced the price when I found that I could give them a concession on the 2-pound.

Q Those you were packing anyway, were you not? A No.

Q Was there ever an agreement of any kind which Mr. Lerman participated in for 2-pound raspberries at 39 cents a pound? A Not directly with me.

Q With anybody, I mean, that you know of personally? A The agreed price was 40 cents.

Q And that was this conversation on July 5? A Yes.
 Q And that was the only conversation that ever took place about the price, so far as you know? A That settled it. It was left to me.

* * *

91 *Further Direct Examination*

BY MR. BERUEFFY:

Q Mr. Elder, this is a copy of your complaint which appears in the court records. I call your attention to Exhibits Nos. 9, 10 and 11 of that complaint which are warehouse receipts covering 21 packages of raspberries, are they not? A They are.

Q Were all of those raspberries sent to Chicago for Mr. Lerman's account? A I would like to check my record, if I may, please.

92 Q Surely. A I am sorry. I can't find the information here that will help me to answer that.

Q You have no recollection? A No, I haven't. The invoices would verify it.

Q Would the drafts help you? A I have to tie the drafts together—

* * *

95 Q Now, I want to call your attention specifically to Exhibit 15 and the letter of explanation. Would you look at those two papers specifically? A Yes, sir.

Q That Exhibit No. 15 represents a mistake in book-keeping and was actually a sale of the Lerman merchandise, that is, you repriced it? A Yes, that the warehouse had taken out of the one load there.

Q Excluding that one Exhibit 15, those exhibits, 13, 14, 16, 17, 18, 19, 20 and 21 all represent resales, other sales of this merchandise, these sales of this merchandise to other people? A Beginning with 13, you say?

* * *

RECEIVED AT CHICAGO ILL. JULY 1934

96 Q Well, we understand No. 15 was only put in there as a formality, because there was a book-keeping mistake made. A No. 20 is not included in the summary, either. They were invoices to Squire-Dingee Company, but were not—they did not go through so that they were then brought over into the final block.

Q I see. A No. 15 and No. 20 are excepted. With those exceptions, all of those represent transfer of the merchandise which is in suit here.

Q You say transfers of merchandise which is in suit here? A Yes, they do.

Q Do they represent all of the sales that were made, Mr. Elder? A All of the sales of raspberries we made that season.

Q No, all of the sales of raspberries involved in that suit. A I am sure that accounts for everyone. I would have to run my totals.

* * * *

97

Further Cross Examination

BY MR. GARNETT:

Q Exhibit 2 is shown on Exhibit 26, identifies it on Exhibit 26. It is a matter of \$912? A Yes, sir.

Q Was that a recap, I mean a mitigation sale? A It was.

Q In order to mitigate the loss?

Let me look at Exhibit 3, \$131— A —.82.

Q That also was a sale to mitigate the loss? A It was.

Q Exhibit No. 4, \$21.12. A It was.

Q No. 5, \$31.68. A It was.

98 Q No. 6, \$1,020? A It was.

Q No. 7, \$960. A It was.

Q No. 8? A \$6,321.90.

MR. GARNETT: What is the next?

MR. BEACH: 8-A.

MR. GARNETT: \$43.80. The next item is \$43.20.

THE COURT: \$43.20. What does that mean, open?

THE WITNESS: That is 12 cases, \$43.20.

BY MR. GARNETT:

Q You have got "Open" on there. A That had not been paid. That was an open invoice that had not been paid.

Q It has been settled now? A At the end they didn't take—we sold the block. They were taking that as a sample to run a little jam from it, and then we got a sale for the whole block, and it was not necessary for them to pick up the samples, then.

Q That was the value of the samples? A That was the value of the samples.

Q Next, \$12.80, Exhibit 8-B, I guess.

MR. BERUEFFY: 8-C, isn't it?

BY MR. GARNETT:

Q What is that, a sale to the House Brothers
99 Trucking? A I must assume that was a damaged carton they paid for. They do our trucking of the merchandise, and we charge that.

Q Charged them \$12.80 for the damage? A Yes.

Q And 8-A, I believe, is \$61, you have had adjusted?
A That would be 8-B.

Q That is 8-B, \$61? A I assume that merely is samples that were given to the various brokers who attempted to sell, and I charged our own company for that sample.

Q And the total makes— A \$9,515.52.

Q Less \$377.40 brokerage and freight, leaving the balance that you sold there of \$9,138.12? A Correct.

.

100

Further Redirect Examination

BY MR. BERUEFFY:

Q How many cartons did you receive from Johnson City, Tennessee, do you know? A Forty thousand.

Q And you used 17,000 and some of them? A Yes.

Q What did you do with the rest of them? A We sold them, and attempted further—

Q Do the proceeds appear on this recap? A They are in there, somewhere.

Q I just don't see them on this recap, Mr. Elder. A I don't see them on this paper unless they are in some other form there.

Q Do you have a record of it? Just give us the amount you recovered from it. A I may have it on this (indicating).

Q Well, Mr. Elder, may I suggest to you in the yellow sheet which we looked at previously, and which you
101 took out of your case, you did have a figure written. I was not intentionally looking over your shoulder. A That is all right.

Q Isn't that it? A Yes. On this work sheet I show 200 cartons containing—my figure here is in error. I am positive it was 40,000 instead of 48,000. This is merely my work sheet.

Q Surely. I understand. A Being I had never received copies of anything, I had to take an approximate price, approximate value of those containers, because there was no billing of any type received. And so this is not—this is merely a work sheet calculation that I would have to go back to to determine the actual amount, but I think somewhere there is a recap of a freight bill showing the quantity received.

Q Assuming it was 40,000 that you received, and you credited those at \$24 a thousand, is that right? A I credit those at \$24 a thousand.

Q That represented the approximate value, so far as you could tell? A Those read you were just the work file, the work items that I have on. I have it less credit on No. 1 packages so marked. The figure would have to be determined. How much is it for Lerman again, 17,232?

And then those that were scrapped because of the stamp, there was no resale value, those that had been stamped up.

I have a recovery of \$780.82.

Q Do you think that is approximately accurate? A Less the freight on the containers which I had forwarded.

Q How much was the freight? A \$148.20. That reduced my recovery to \$632.62, which should answer that, I think.

THE COURT: Is that shown on the recap any place?

MR. BERUEFFY: No, it is not.

MR. BEACH: No, it is not.

* * * *

Recross Examination

BY MR. GARNETT:

Q Mr. Elder, I notice the Secretary credits you and charges Lerman Brothers with insurance amounting to \$69.38 and storage of \$862.01. A Yes.

Q That appears in Exhibits 22 and 23, is that correct? A Yes. We carry insurance on merchandise in the warehouse.

Q How did you approximate the \$69.38 as allocated to Lerman pack? A That is based on a dollar rate on the value in the warehouse, and we determined the value of this red raspberry block, and multiplied that by the rate they charged us by the month on that.

Q And your Exhibit No. 22 gives a recap of storage charges and totals \$862.01? A That was the insurance, \$62, was it not?

MR. BEACH: That is storage.

THE COURT: That is the storage.

* * * *

Q That aggregated \$862.01 which is charged against Lerman in your account? A That is right.

Q And on Exhibit 23, if you will look at it, there is a premium on insurance paid to Queen Insurance Company of America of \$162.34, so that amount you charged, according to the Secretary's finding, \$69.38, to the insurance on these goods, that is what the Secretary allowed?

A Our insurance is based on the dollar volume that we carry on an average. We had a total of \$581,000 in the warehouse, but that is taking the average of the
104 season. They have the rate determined there. We took the value of the merchandise that was held there for Lerman and arrived at it on a similar basis to what we did on the storage.

Q You multiply the 33½ cents by the number of pounds—by the value? A By the value of the goods.

Q Which included \$69.38?

MR. BERUEFFY: The rate is 33½ cents a thousand, isn't that right?

THE WITNESS: Yes.

BY MR. GARNETT:

Q Therefore insuring your merchandise at \$48,000, isn't that right? A No, we didn't. That was the average value we carried in our total. We determined it—they take our maximum—they take your maximum load, they arrive at a total maximum of the dollar volume we have in the warehouse and then strike an average from that, and from that average they have arrived at a rate of 30.335 cents. Then I took that rate, having that rate established.

MR. BERUEFFY: \$69.38?

MR. GARNETT: I would like Mr. Elder to summarize this thing.

This draft, Exhibit 27, July 10, 1946, \$13,565.76.

No. 28, July 12, 1946, \$2,358.72, your draft No. 29.

105 July 25 was \$6,892.80, making a total of the drafts of \$22,817.28.

Against that your credit of \$9,138.12 was resales of stuff, reducing it to \$13,679.16.

In addition, you are charging storage of \$862.01, making a total of \$14,541.17 and this insurance of \$69.38, making a total of \$14,610.55 for which you are asking?

THE WITNESS: That is correct.

MR. BEACH: That is the amount found by the Secretary.

MR. GARNETT: That is the amount found by the Secretary, that is right.

MR. BERUEFFY: Your calculation you just made does not include the \$613 for the cartons, does it?

THE WITNESS: No.

* * * *

106

David Ely Beasley

* * * *

Direct Examination

BY MR. BERUEFFY:

Q Would you state your full name? A David Ely Beasley.

Q Where do you live? A 3125 North Sixth Street, Harrisburg, Pennsylvania.

Q What is your business? A I operate a frozen food brokerage business, and I am also a sales manager for a food distributor.

Q In so far as your brokerage business is concerned, is that your own business? A Yes, it is.

Q Is it a sole proprietorship? A That is correct.

Q Calling your attention to the month of July, 1946, where were you then employed, Mr. Beasley? A I was employed at that time by the W. J. A. Dietrich Company, Baltimore, Maryland.

Q Did you have any proprietary interest in that company? A None whatsoever.

107 Q What was your relationship with the company? A I was an employee salesman.

Q Were you paid on a salary? A Yes, sir.

Q By Mr. Dietrich? A Yes, sir.

Q And you were Mr. Dietrich's employee? A That is correct.

Q Previous to that month, Mr. Beasley, had you ever known Mr. Harry Lerman? A Yes.

Q When and how had you known him? A Well, I knew him from telephone conversations from Dietrich's office, and I met him in his office one day when I came to Washington with Mr. Dietrich.

Q That was before July, 1946? A To the best of my recollection.

Q Yes, sir. Now, in July, 1946, prior to July, 1946, had you been acquainted with C. A. Elder? A Yes, sir.

Q How long had you known Mr. Elder? A Since about 1940.

Q And what was the nature of your acquaintance with Mr. Elder? A I was sales manager for a
108 grape juice firm in Norfolk, and the vice-president of this firm went to Michigan and sent me on occasion to Michigan to try to buy grapes, and I met Mr. Elder during those trips.

Q In July, 1946, were you sent to Michigan, to St. Joseph, by Mr. Dietrich? A I was.

Q When did you go to St. Joseph, Mr. Beasley? A To the best of my knowledge I left Baltimore on July 1 and drove out.

Q You drove out to St. Joseph? A That is correct.

Q When you went to St. Joseph, did you have business dealings with the Fruit Processors, Incorporated? A Yes.

Q Did you have any interest in that company, Mr. Beasley? A None whatsoever.

Q Do you recall the transaction between Fruit Processors, Incorporated, and Lerman Brothers? A You mean the specific transaction with regard to Fruit Processors at that time?

Q Yes, sir. A Yes.

Q What part did you play in that transaction,
109 Mr. Beasley? A Well, having known Charley Elder, I got in touch with him prior to this transaction in an effort to locate merchandise for various customers that the Dietrich Company were serving or selling to, and in that particular transaction we were looking for several items of fruits which were in demand at that time, and that was the part I played, was the effort to get merchandise which Mr. Dietrich sold and which I also sold to several customers.

Q Dietrich was a broker, I take it? A A food broker, yes.

Q He was selling merchandise to various customers of his, is that correct? A For the packer.

Q He was selling for the packer? A Yes.

Q And in this transaction you regarded yourself as a broker representing the packer, did you not? A Well, I was a salesman for the broker.

Q And you regarded the broker as representing the packer? A That is correct. The broker I worked for represented the packers.

Q Now, calling your attention to the specific transaction with Mr. Lerman, after you got to St. Joseph, Michigan, how did you get in touch with Mr. Lerman?

110 A With Mr. Lerman?

Q Yes. A I called him on the phone.

Q How many times did you call Mr. Lerman on the phone? A To the best of my recollection, only once.

Q Just once, and what was the date on which you called Mr. Lerman? A I can't be too specific, but again I would say it was probably July 5th or 6th, because I was there on July 4, and I believe it was a day or two after that.

Q Would you be familiar with Mr. Dietrich's initials? A Yes.

Q I am going to hand you a paper which has been marked Lerman No. 2 for Identification and ask you to look at the bottom. There is "W. J. A. Dietrich Company, per." Do those appear to be Mr. Dietrich's initials? A My answer is yes.

Q I want to call your attention to the date on that paper, which purports to be July 11, 1946. Did you prepare that? A Mr. Dietrich, in that I recall.

Q Could you tell us what that date probably refers to? A This date (indicating)?

Q Yes, sir. A I would say it doesn't mean
111 anything, because in many instances transactions were completed and the sales memorandum written up a few days before or in some instances prior to the agreement with the customer, and the sales memorandum would be written up afterwards.

Q You also discussed with Mr. Lerman some cherries, did you not? A They were part of the overall discussion for the fruit that Mr. Lerman and many other customers wanted.

Q Would you look at this paper, which has not been marked as yet? That also is a memorandum of Mr. Dietrich's company, is it not? A Yes, that is correct.

Q Would you look at the date on that and see if that would tend to refresh your recollection as to the day on which you talked to Mr.— A I can't tell from that, if that is the day the sales memorandum was written, the day I talked to him.

Q I see. You don't know? A No, sir.

Q You talked to Mr. Lerman on the phone and then at some time subsequent to that these sales memoranda were written up, is that correct? A Well, I can't state that positively, because I was in Michigan, and I talked
112 to Mr. Lerman, and I also talked to my office several times, and of course these sales memoranda being made within a few days of the conversation, I can't say. It was four years ago.

Q You couldn't state with any particularity at all the date on which this conversation took place? A Not within more than a week's period of time. I know it took place somewhere between the 2nd and the 8th of July, I would say somewhere within that, because I was out there one week, and it took place during that week. The telephone records would probably show the date.

Q After you talked to Mr. Lerman, did you then notify Mr. Dietrich as to the results of the conversation? A Yes, I did.

Q When you called Mr. Lerman on the telephone from St. Joseph, Michigan, do you remember where you were? A Yes.

Q Where were you? A I was in the outside office of Mr. Elder's private office at their factory office at St. Joseph, Michigan. In other words, the entrance or ante-room.

Q And in this transaction you discussed the purchase of some cherries, some raspberries? A Primarily raspberries. We may have discussed cherries, but primarily red raspberries.

Q You discussed two kinds of red raspberries, 113 did you not? A Well, they were the same kinds of raspberries, but two types of packages.

Q Do you recall, were any of the raspberries you discussed already packed? A Yes.

Q And which of those were already packed? A 30-pound tins. May I clarify my previous statement? There were three kinds of raspberries, three types of packages, rather.

Q The 30-pound tins were already packed? A Yes, sir.

Q Would you tell us with reference to the 30-pound tins the conversation which you had with Mr. Lerman? Incidentally, it was Mr. Harry Lerman you were talking about? A Incidentally, that is right. There wasn't any-

thing of any specific nature with regard to red raspberries and cherries. It was understood the red raspberries were ready for shipment. It was understood they were to come in on a pool car with another customer, and cherries as quick as we could get them ready to come in. My specific conversation was with regard to the small packages, the 2-pound packages and the 1-pound packages, but the 30-pound tins were ready and were shipped. I can only state that they were ready in so far as the packer accepted the order for shipment.

114 Q That was for immediate shipment? A That is correct.

Q Do you know if any of those raspberries were subsequently shipped? A Only from hearsay.

Q In your discussion about those raspberries, what was said about the grade or quality of the raspberries? A The only thing that was said with regard to the quality was that they were to be good quality. There was no grading at that time, to the best of my knowledge, in so far as Agricultural Department grades are concerned, referring to fruits of that type, and it was understood they were to be acceptable quality.

Q Now, was the price of the raspberries agreed upon? A The price of the 2-pound package?

Q No, I mean the 30-pound. A Yes, the price was agreed on.

Q Did you know what the price was? A 35 cents.

Q Were there any terms with reference to the manner and place of shipment of the 30-pound cans of raspberries? A Yes. They were part of a pool car shipment to come in under sight draft bill of lading term with a stopover for partial unloading in Sunberry, Pennsylvania, for a firm named Barfield & Company, Incorporated.

115 Q Now, I call attention to this paper which has been marked Lerman's No. 2 for Identification, and which I think you have already seen, and I call your attention to the fact these were loaded to be shipped f. o. b.

Chicago warehouse, packer to pay first month's storage.

A That is right.

Q Having looked at that paper, does that refresh your recollection as to the terms of shipment? A They could be released anytime after that for shipment in any manner prescribed by the buyer and broker or to the packer, and they were apparently shipped after the sales memorandum was written, when they were released for shipment, or when proper arrangements were made to combine the two shipments, in order to get enough weight to benefit from the carload freight weight.

Q I understand that, but these were f. o. b. Chicago warehouse. That means, does it not, the Fruit Processors were to get them from the Chicago warehouse and pay the first month's storage at their expense, and then it was up to Lerman to pay the sight draft and get the raspberries on to Washington? A No. That is not exactly the way it works. When a packer puts merchandise in a warehouse he can at the request of the buyer ship that
 116 out himself at any time, but it is the general practice to draw a draft and attach a warehouse receipt to it at the time it is put into storage, but if the buyer comes back and asked the packer to make a shipment, he will notify the warehouse to ship the merchandise.

Q None of the merchandise is released until the sight draft is paid, isn't that correct? A No, it is shipped prior to payment of sight draft. The merchandise is shipped and the draft is usually drawn at the same time.

Q That is shipped through the warehouse? A No, not necessarily. I will try to clarify myself. In this specific instance—

* * * *

Incidentally, I merely want to test Mr. Beasley's recollection as to what the contract, if any, was, and I
 117 was merely asking him if the contract called for

f. o. b. from Chicago warehouse. Is that the way you recall the conversation?

THE WITNESS: May I explain briefly? If that is what you are driving at, then I would like to state that the fact this merchandise went into Chicago, and other merchandise was shipped from the plant, and other merchandise shipped prior or subsequent, or at later dates, doesn't mean there were several different agreements, because my customers would give me orders for four or five items packed at all different times during the year, but they would give me those orders at one time. It was basically one order but then might pick a time and get a carload shipment, in the ability to save freight by combining different people's, some of which would enter into the picture.

BY MR. BERUEFFY:

Q Now, I believe you said that the only agreement was that this was to be good merchandise? A That is correct.

Q Was anything said about any inspection of merchandise? A Nothing whatsoever.

Q Now, calling your attention to what has been marked Lerman No. 1 for Identification, does that appear
118 to you to be Mr. Dietrich's memorandum? A Yes, sir.

Q And that covers what, Mr. Beasley? A It covers 1,500 cases, 12 2-pound frozen raspberries, 5 by 1 pack at 40 cents, frozen, and 1,500 cases, 24 16-ounce, the same, S. A. P., which means subject to approval on price.

Q Did you also discuss these raspberries with Mr. Lerman in that telephone conversation? A Yes, sir.

Q Did you ever discuss them at any other time, that is, terms of this transaction? A You mean the terms at the time the transaction occurred?

Q Yes. A The beginning of things?

Q Yes. A No, I don't recall.

Q What was said about the grading of this merchandise? A There were no discussions regarding the grading, and I told Mr. Lerman I had seen the merchandise personally, it was good merchandise. He said that was all he insisted upon, having good merchandise. As far as the grading was concerned, there were no requirements of grading.

Q When you say good merchandise, you mean merchandise which could be resold? A That is correct. I mean primarily that the merchandise coming into the plant which I saw was clean, and solid and firm, and was fresh and fit for packing good merchandise.

Q What, if anything, was said about inspection of this merchandise? A Nothing was said with regard to inspection.

MR. BERUEFFY: Nothing at all? I think that is all.

Cross Examination

BY MR. GARNETT:

Q Mr. Beasley, did you know whether or not these 600 cases or cans of red raspberries were inspected? A Do I know if they were inspected? No, I do not.

Q Were they—at the time you were there? A I can't answer that, sir, because the red raspberries had been packed and were in Chicago. The red raspberries I saw at the plant were what they were packing in 2-pound cartons.

Q These 600 cans were in Chicago at the time? A To the best of my knowledge.

Q Didn't you so inform Mr. Lerman they were in Chicago? A I presume so, but I can't be specific. I mean I must have told that to Mr. Dietrich, because I called him, and he wrote the sales memorandum.

Q Mr. Beasley, there were bought for Lerman Brothers the 600 cans of 30-pound red raspberries, 1,500 cans

of 1-pound packages, and 1,500 cases, I mean, of
120 16-ounce packages, and \$10,000 worth of cherries.

Were they bought at the same time? A Mr. Dietrich handled it the same, as far as I am concerned, in the office in Baltimore, and the information was relayed to me they were all the same purchase.

Q Didn't you buy them for, didn't you make agreement or Mr. Dietrich, on purchase? A No, sir. The purchase was made from Mr. Dietrich and he handled the office work, and then I went out to Michigan, and he came in with an order, as they do many times, that "I want this, I want that, and I want the other thing."

Q Mr. Lerman did? A Mr. Dietrich brought the order back from Washington.

Q When you went out and closed the deal with Fruit Processors, you closed it all one day? A As one unit, yes, sir.

Q Did you agree upon the price of these 1,500 cases marked S. A. P.?

MR. BERUEFFY: I object to that, Your Honor.

* * * *

121 MR. BERUEFFY: May I finish my objection, please, on the ground it is an attempt to vary by parole evidence the terms set forth in the memorandum signed by Mr. Dietrich? This man's testimony is that Mr. Dietrich handled all of the sale as far as Lerman is concerned.

THE COURT: The objection is overruled. You may answer.

Will you read the question?

(The question was read by the reporter.)

THE WITNESS: Yes, sir.

BY MR. GARNETT:

Q You agreed with Mr. Lerman as to the price? A On the telephone conversation?

Q On the day that the order was taken. A It was

on the day I called him. The day I was in Michigan and I called him on the phone.

Q Why were raspberries in 1-pound containers a cent more per pound than 2-pound containers? A That is normal. In other words, to process and pack it costs more money, more labor, to put them in little packages than larger packages.

Q Additional labor cost? A Primarily.

Q Did you have any further conversation with Mr. Lerman except that phone call on the subject?
122 A No, sir, other than during the interim, after that, in the normal course of my office duties, I called him about picking up the drafts which he would not have picked up.

Q What did you say?

MR. BERUEFFY: Just a minute. I object to that. That is not material here.

THE COURT: Objection overruled. Answer.

THE WITNESS: Well, he said he would pick it up in a few days, and that happens many times with customers, and usually you wait a few days.

BY MR. GARNETT:

Q Did he at any time demand any inspection? A Not of me, no, sir.

Q Did he ever demand any inspection as far as you are concerned? A Not of me, no, sir.

* * * *

Redirect Examination

BY MR. BERUEFFY:

Q I would like to ask you, Mr. Beasley, if it wouldn't be usual in the trade for an inspection to be demanded of the processor rather than from the broker, in any event? A Not at that time, sir.

Q It wouldn't be unusual to ask the packer and
123 not you for an inspection, would it? A I would say yes, it would be unusual.

Q Do you know when the drafts arrived in Washington for Mr. Lerman to pick up? A Only within a reasonable period of time, within a week or two. I would say around the middle of July, or slightly after that, to the best of my recollection. I can't be more specific.

* * * *

Q Do you know from your experience in the brokerage business about when—how long it takes for drafts to come—

* * * *

THE WITNESS: From Michigan to Washington, two days, I would say.

BY MR. BERUEFFY:

Q When you went out and made this transaction at that time as Mr. Dietrich's employee, you bought at Mr. Dietrich's direction for a number of customers other
124 than Mr. Lerman, did you not? A You say I bought for them.

Q That is, Mr. Dietrich bought. A He doesn't buy.

Q Well, you were representing Mr. Dietrich, and he had orders from customers other than Mr. Lerman, didn't he? A Oh, yes.

Q You bought all of those orders, or you arranged for all of those orders at the same time as far as Fruit Processors was concerned? A When you say "bought" it confuses me. I was an employee of a selling agent. We really sell for the packer. The buyer buys from the packer.

* * * *

Q However, as I say, you arranged these transactions. Suppose you tell me what you call it. A Well, at that time merchandise was very scarce, all types of merchandise. It was right after the end of the war. There had been a big demand for fruit products all during the war because of allocations, and one thing and another.

In order to take care of the customers Mr. Dietrich had after I came with him, I went into other markets he had not been covering at that particular time, but we
 125 needed merchandise for many customers and many kinds.

Q And for a number of customers? A And for a number of customers. My particular trip to Michigan was made for the purpose of getting merchandise which Mr. Lerman wanted and several other people wanted from a packer we had not previously been, whom I had known a number of years, and we had hopes we could get merchandise from him.

* * * *

Recross Examination

BY MR. GARNETT:

Q It was a seller's market? A Yes.

Q Mr. Berneff asked you about the custom of the trade. What was the custom of the trade when an inspection is demanded? Is it put on the memorandum of sale, or not? A Yes, sir. It is written on the sale memorandum.

Q When a special grade is desired, what about that? A That is also written on there. The Department of Agriculture has several grades. Some customers want a B grade, some won't take anything but A grade. In order for the packers to know what you want, you have to put it on there.

Q I understood you to say as far as raspberries were concerned, you knew of no grades the Department
 126 of Agriculture had established? A I knew of no grade on raspberries, as well as several other food items at that time.

* * * *

Redirect Examination

BY MR. BERUEFFY:

Q You did tell Lerman this merchandise was good?

A I did.

Q You are familiar with the Perishable Agricultural Commodities Act, are you not, Mr. Beasley? A Not in its entirety.

Q But you know transactions of this sort are subject to the Act, do you not? A I believe they are.

* * * *

127

William J. A. Dietrich

* * * *

Direct Examination

BY MR. BERUEFFY:

Q Will you state your name, please? A William J. A. Dietrich.

Q Your business address? A 205 East North Avenue, Baltimore, Maryland.

Q What is your business? A Food broker.

Q Do you do business under a trade name? A Under the name of W. J. A. Dietrich Company.

Q Is that a sole proprietorship, partnership, or company? A Sole proprietorship.

Q You are the owner of that company? A I am.

* * * *

128 Q In what business does the W. J. A. Dietrich Company engage? A In the brokerage business.

* * * *

Q Any particular kind of brokerage, Mr. Dietrich? A Dried and frozen foods.

Q Do you represent packers or sellers? A We represent the packers or the sellers, normally.

Q Do you now represent as one of your packers Fruit Processors, Inc., of St. Joseph, Michigan? A We do.

Q When did you begin to represent them as brokers? A In 1946.

Q What do you sell for that company, Mr. Dietrich? A Well, we sell the various commodities which they pick, strawberries, raspberries, cherries, some currants, juices.

Q In 1946, were you acquainted with Lerman 129 Brothers, Washington, D. C.? A I was.

Q What was the nature of your acquaintance-ship? A We had sold them merchandise for a few years prior to that.

Q In 1946 were you selling merchandise to Lerman's on the account of packers whom you represented? A We were.

Q I am going to hand you three papers which have been marked Lerman's No. 1, 2 and 4, for Identification, and ask you if you can tell us what those are? A You mean do I know what is on these?

Q Just tell us what they are. Don't describe them. Just tell us what they are. A They are confirmations of orders.

Q Issued by what company? A They are issued by us.

Q By W. J. A. Dietrich Company? A W. J. A. Dietrich Company.

Q I want to call your attention to Lerman's No. 2. Does that represent all of the details of the transaction which you had with Mr. Lerman respecting the commodity that is mentioned there? A It does.

Q I want to call attention specifically to the 130 date and ask you what that date means? A What the date means? The date means the day the order was written up.

Q Would that necessarily be simultaneous with the receipt of the order? A No.

Q Would it necessarily show the receipt of an order of that kind? A It would, yes. Many times we get orders and it may be two or three days before they are written up.

Q Can you tell us whether something like this was ever written up before the order is received by your company? A No, because we cannot write them up unless we have the order.

Q I see. These are your initials? A Those are my initials.

Q That order was prepared under your direction and signed by you? A I couldn't vouch that it was prepared under my direction, because many times an order might come in over the telephone and my secretary would write up the order, and then put it on my desk for signature.

Q I see. When you write one of these orders, is it your intention to set forth all of the terms that govern that particular transaction? A Normally we do.

131 Q Now, when the terms are listed, sight draft through American Security & Trust Company, is that a matter of agreement between you and the purchaser? A The purchaser usually gives us the name of his bank, because it is a convenience to him to have the draft come in his own bank. If it came through an outside bank, he would have to go to his depository, have a check certified, and take it to the bank which the draft came through.

Q As a matter of fact, the business of a sight draft is pretty much standard in all the purchases? A It is pretty much.

Q Right under the item "Terms" there is an item "F. o. b. Chicago warehouse. Packer to pay first month's storage." Is that a matter of agreement between you and the customer? A The packer always pays the first month's storage.

Q You don't write that in there until you have agreed with the customer that is what is to be done, is that right?

A No, we don't. In this particular instance Fruit Processors were freezing some merchandise in Chicago, which necessitated a haul from their packing plant into the Chicago warehouse, because in those days it was at times impossible to obtain freezing space close at hand.

Q I understand that, but when this order came in and you talked to Mr. Lerman about it, you told him
132 this was in the Chicago warehouse, and it would be f. o. b. there, and he accepted that, isn't that right?

A That is true.

Q And he agreed, didn't he? A That is true, yes.

Q Any other terms are written in there under "Remarks," is that correct? A The terms would be written under "Terms." If there is anything unusual about the shipping instructions, then we normally put it under "Remarks," or put it down here in the body of the order.

Q Showing you Lerman's No. 4, that is a similar order for cherries, is it not? A It is.

Q And there again you have stated the terms as they were agreed upon by yourself and Mr. Lerman, is that correct? A That is true.

Q Now, showing you Lerman's No. 1, that again is an order for frozen red raspberries, is that correct? A That is true.

Q And that again represents the terms of the agreement as you and Mr. Lerman agreed upon them, does it not? A I can't say I agreed upon them, because this particular transaction was consummated by Mr. Beasley over the telephone.

133 Q From whom did you get the information? A The information, Beasley, as I recall, phoned the information into the office.

Q On the basis of that information you then prepared and signed? A Wrote up the order.

Q That order represents the terms as you understood them from Mr. Beasley? A Yes.

* * * *

(The documents heretofore marked Lerman's Exhibits Nos. 1, 2 and 4 for Identification were received in evidence.)

* * * *

Q You had dealt with Mr. Lerman prior to this occasion, Mr. Dietrich? A Many times.

Q To your knowledge had Mr. Lerman dealt with Fruit Processors, Inc.? A Prior to this instance?
134 Q Prior to this. A Not to my knowledge, no.

Q Did you discuss with Mr. Lerman the quality of merchandise that would be shipped under these orders? A I told Mr. Lerman he was a reputable packer, that Mr. Beasley had known him for some years, and that I felt sure that the merchandise shipped would be just as we had described it.

Q How had you described it? A As good quality merchandise.

Q That was sometime in the early part of July that you had described the merchandise that way? A I would say it was probably towards the end of June when we discussed Fruit Processors, because as I recall it was around the first of July that Mr. Beasley went out to Michigan.

Q Would you recall of your own knowledge now whether the dates of the orders which have been admitted in evidence are approximately the dates on which these transactions took place? A I couldn't say that definitely, no.

Q What, if anything, was said by you or by Mr. Lerman with respect to an inspection of this merchandise? A Mr. Lerman, sometime after the goods had been packed and placed in storage notified us he wanted an inspection of the merchandise, and he was informed there had
135 been no inspection requested at the time the deal was consummated.

Q At the time this transaction took place, what, if anything, was said by you or by Mr. Lerman about inspection? I mean prior to the issuance of these orders.
A Nothing.

Q Not a thing? A Nothing.

Q And then later Mr. Lerman notified you he wanted an inspection of this merchandise? A Much later.

Q About when was that, if you remember? A As far as I can recall, and I am afraid I would simply be guessing, it would be along about the first of August, or shortly thereafter.

Q Did he tell you by whom he wanted the inspection made? A Not that I recall. I don't know whether he specified the United States Department of Agriculture, or whether he wanted to make a personal inspection of it.

Q Do you know whether or not the packer granted that inspection? A To the best of my knowledge, he did not.

Q Mr. Dietrich, how long have you been in the fruit brokerage business? A Since 1931.

136 Q As a part of your business, do you keep aware or abreast of changes in the price levels of the market? A We attempt to.

Q And do you attempt to familiarize yourself with market conditions? A We do.

Q Calling your attention to the latter part of 1946 and the early part of 1947, there was a decline in price levels of frozen merchandise, was there not? A There was.

Q Can you tell us approximately when that decline was first noticeable? A When it was first noticeable?

Q Yes, sir. A It started, as I recall, around the middle of August of 1946.

* * * *

Q Are you familiar with the magazine Quick Frozen Foods? A I am.

137 Q Are you familiar with the fact that that magazine monthly publishes market quotations on various frozen commodities? A Very familiar with them.

* * *

Q You say that the first decline in price, so far as you personally recall, was about the middle of August? A As far as I can recall, yes.

Q And was it an immediate break, or was it a decline in the market? A The business just seemed to stop abruptly. Largely because of this article in the Wall Street Journal.

* * *

Q Do you have any personal knowledge, Mr. Dietrich, of what the price of raspberries, frozen red raspberries was in November of 1946? A You mean the price a packer may ask for?

138 Q The asking price, yes. A I do not recall definitely, no.

Q Do you recall the price in August and July of 1946? A The price in July and August?

Q Yes, sir. A The prices that particular year were in the neighborhood of or ranged from possibly 38 to 40, 41 cents.

Q What month was that? A The latter part of July, early July.

Q And that price was maintained until this stoppage of business to which you have referred, isn't that right?

A No, I wouldn't say definitely that price had been maintained until the stoppage.

Q Well, how much of a decline was there, do you know? A I don't know.

Q If I were to hand you a copy of Quick Frozen Foods and show you the quote in there, do you think it would refresh your recollection?

* * *

139 Q Now, let me ask you the next question. Having read that, Mr. Dietrich, is your memory refreshed as to the price of raspberries about the middle of August? A If you want me to answer that question, I am going to have to answer it in my way.

* * * *

140 Q Do you have an independent recollection?
A Yes.

Q What is it? A Those quotations in the quotes are packers on the West Coast. They are not quotations of merchandise available and on hand possibly here in the East. We got into our office once a month a questionnaire from the same magazine asking us to provide them with quotations from packers. What is meant there are their opening quotations. That is where those figures come from, but they do not portray the market in the South, or the East, or in the Middle West.

Q You haven't any recollection as to what the market price of 1 and 2-pound packages of frozen red raspberries was as of the middle of August, 1946? A I would say it was approximately around those figures that are described in the book.

Q That is around 38 to 40? A Yes, the packer's price.

Q Do you have any recollection what the price was for the same package in September, any independent recollection? A You mean merchandise in the packers' hands, or merchandise thrown on the market?

* * * *

141 Q You are not a market expert? A I don't know what prices were four years ago, in this commodity. They may be 30 cents in this section, they may be 25 cents in this section or another. Most of these quotations in this magazine are packers' quotations. That does not necessarily set the market. The packer may feel that, but that does not mean he is going to take orders on that basis.

* * * *

142 Q I will now ask you, Mr. Dietrich, if you recall the price of 1 and 2-pound packages of frozen red raspberries on the Eastern Seaboard area as of September, 1946, and if you do not recall, you can answer that question no. A Frankly, I do not.

Q Thank you. You do, however, recall the price of this merchandise after the middle of August was constantly declining? A I do.

Q I will ask you, in frozen red raspberries has there ever been an upturn in price that you recall? A Not to my knowledge. There hasn't been much, even today. They are rather a drug on the market.

* * * *

143

Cross Examination

BY MR. GARNETT:

Q Mr. Dietrich, Mr. Lerman of Lerman Brothers had been a customer of yours for years? A He has.

Q How many sales do you estimate you have made for Lerman Brothers prior to the Fruit Processors transaction? A That would be a rather difficult question to answer. I would just be guessing. Possibly 25, 30, maybe 40.

Q Had you just previous to this made a purchase for them of frozen foods from Harman Brothers, or Harman, in Johnson City, Tennessee? A We didn't purchase it for them, no. We arranged the deal, because he wanted strawberries, he wanted raspberries, and as I recall some blackberries picked. We arranged for them to be picked at the Harman Frozen Food Plant in Johnson City, Tennessee.

Q Was that transaction handled just as the Fruit Processors transaction? A Exactly the same.

* * * *

144 Q Did Lerman Brothers send containers to Johnson City, Tennessee, for the packaging of that frozen food you sold them for people in Tennessee? A They did.

Q When you had this deal with the Fruit Processors did you have any understanding as to who should furnish the containers for the 1-pound packages? A We did.

Q With whom? A With Lerman.

Q What was your agreement with Lerman? A What was my agreement with Lerman?

Q Yes. A The way the deal was arranged, all the containers that had not been used at Johnson City
145 were to be shipped up to Fruit Processors to be used in packing the 1-pound raspberries.

Q And they were shipped? A They were shipped.

* * * *

Q Mr. Dietrich, in the file in this case before the Secretary there is an exhibit of a telegram from you to the Fruit Processors, dated on the 22nd of July.

THE COURT: What exhibit number?

MR. GARNETT: It was Exhibit No. 31, under date of July 23, in which you say: "Retel 22nd. Lerman draft cherries paid. Other being paid tomorrow."

BY MR. GARNETT:

Q Did you send that telegram? A I did.

Q By what assurance did you say the other
146 draft would be paid tomorrow? A Mr. Lerman's assurance it would be paid.

Q How many conversations did you have with him about paying these drafts? A I would say two or three times personally, and possibly the same number of times over the telephone.

Q What excuse did he give for not paying them? A Usually that he was a little bit pressed for money, he would pick it up in a day or so.

Q Did he ask for any inspection at that time? A He did not.

Q He did not deny the sale or transaction? A He did not.

* * *

Q Now, as I understand it, this was a seller's market. The seller did not have to look for customers? A No.

Q Great demand for frozen fruits at that time? A There was.

Q Were you approached by the seller or Mr. Lerman as to these goods? A By Mr. Lerman, because
147 he had—one day when I visited him at his office he informed me he wanted peas, primarily, he wanted raspberries, strawberries, blackberries, and to quote him: "Bill, will you get some for me? Can you get some for me?" In those days, 1943 to 1946, that was our hardest job, trying to find the merchandise for buyers.

Q Did you ever meet him anywhere else other than Washington when he was soliciting the purchase of this fruit? A Have I ever met him anywhere else?

Q Yes. A Yes, I met him in Ogden, Utah, I believe that same year when we arranged to ship several cars of retail peas to him from one of the packing plants out there.

Q Did you have any discussion with him about the raspberries even then? A At that time?

Q Yes. A I believe raspberries were mentioned at that particularly time, but this packer who was involved in the pea deal is not in an advantageous position on raspberries.

Q At that time you had not contacted Fruit Processors? A No.

Q What about the salable general market for fruit packed in one-pound packages? A You say what about the—

148 Q Salable. A What type package?

Q One-pound package. A You mean the regular flat package?

Q Well, packages such as this fruit was packed in. A That was packed in cups and cups were very objectionable for many reasons. They leaked. They didn't stack well in the boxes, and they took up too much space, and when things started to tighten up, I mean in so far as the markets were breaking, then that stuff became a drug on the market and was very, very hard to move because of the type container it was in.

Q Did you make a request on the Fruit Processors for any effort to resell this stuff? A We attempted to sell some of the merchandise, yes.

Q Did you sell some of it? A A small amount of it, yes.

Q Did you find purchasers for the rest? A No, we weren't able to.

Q You did make the effort? A We made the effort.

Q Mr. Dietrich, in the telegram or day letter dated August 7, 1946, to Lerman Brothers from Fruit Processors, Inc.—

* * * *

149 Q A day letter. The contents are this:

"Our bank advises that you have failed to pay sight drafts presented at your designated bank for payment of 1-pound and 2-pound packages of frozen red raspberries packed by us on your order submitted to W. J. A. Dietrich Company as brokers stop. Inspection of the product after pack was not a condition of the order offered to us or confirmed by us at the time of sale stop. Consequently we cannot grant you the right of inspection now as a condition of payment for this merchandise packaged for you stop. You have withheld payment of the several drafts an unreasonably long time therefore we insist the drafts be paid by the close of bank day on Thursday, August eight, or we shall request the American Security and Trust Company to return the drafts to us comma, sell the merchandise at the best price possible at this time and hold you re-

sponsible for any and all loss to ourselves below the amount of the several drafts and including costs of resale and collection of damages stop. Please understand that this action is regrettable on our part but since
 150 this pack of raspberries was put up for your special order only we must take action to protect our interests."

Did you get a copy of that? A I did.

Q Prior to that time when was it request was made of you for an inspection? A As I recall, the request for inspection was around the first of August. It might have been the third or fourth.

Q You informed the Fruit Processors of it? A Yes.

Q How? A I think it was by telephone.

Q Now, in confirmation of sales of merchandise by the broker, between the seller and the buyer, is it customary when an inspection is desired to have it stated in the confirmation of sale? A It is always stated on the order. If there is a grading certificate required, it is stated on the order, a copy of which goes to the seller, a copy to the buyer, and a copy to our office. That is always inserted in the order, if an inspection certificate is a part of the order, that it is stated, the U. S. D. A., Grade A, B, C or whatever the grade might be.

Q In your experience in the sale of merchandise confirmed by order with a sight draft attached, it
 151 provides for inspection, unless it is written on its face? A No.

Q It has been testified it was found in the finding of the Secretary of Agriculture that a rubber stamp with Lerman Brothers' private brand was forwarded to Fruit Processors for use on these packages. Did you ever have any conversation with Lerman about that? A Oh, yes.

Q What was it? A Well, when we went into the original deal with Lerman he told me he wanted his label on the cartons. He had one rubber stamp made

up and sent off to Harman Brothers so that they could stamp the label on the cup. A similar stamp was sent to Fruit Processors for the same purpose.

* * * *

Redirect Examination

BY MR. BERUEFFY:

Q Now, these one-pound packages, while they were not the desirable type of packages,—strike that.

What was the reason for packing these raspberries in the cups, rather than the flat packages, Mr. Dietrich, in July of 1946? A It was the only type container Lerman could secure.

Q What was the condition of the supply of 152 flat containers? Could you have secured flat containers? A No, indeed.

Q Nobody could, as a matter of fact, could they? A No. I say no one. Those orders are usually booked with paper mills six, nine months, twelve months in advance.

Q So that the cups were used because they were the only available containers? A That is true.

Q The one-pound package itself is a standard retail size package, is it not? A Flat Marathon box, yes, sir.

Q Continuing to July of 1946, frozen fruits of all kinds were very difficult to secure, isn't that right? A That is true.

Q And, as a matter of fact, many people were buying these round cups, because they couldn't buy them in flat packages, isn't that right? A That is true.

Q Other than the stamp of "Lerman's Frostee Brand," or trade name, there was nothing—on the top of the box there was nothing that made these raspberries differ from any other frozen raspberries packed in pint cups, isn't that true?

* * * *

153 THE WITNESS: I didn't see the one pounds.
I saw the 30's. They are the same raspberries
from the same section.

BY MR. BERUEFFY:

Q Just the ordinary frozen raspberries sold by any
retail merchant, isn't that right? A That is true.

Q When Mr. Lerman asked you for an inspection,
you informed Fruit Processors of that fact, did you not?

A We did.

Q By telephone. Did you ever ask Mr. Lerman if he
would take these raspberries if an inspection were
granted? A As I remember my conversation with Mr.
Lerman at the time I told him there was nothing in the
original order to warrant him asking for inspection at
that time.

Q So you flatly refused to grant it? A I did not
refuse.

* * *

THE WITNESS: I passed his request along to Fruit
Processors.

BY MR. BERUEFFY:

Q And they refused? A And they refused.

154 Q But you never asked Lerman if he would
take them if the inspection were granted, as far
as you can recall? Your position was he wasn't
entitled to an inspection, wasn't it? A Definitely.

Q You never said: "If we give you an inspection,
will you take the raspberries?" You didn't say that,
did you? A No, I don't recall that I said that to him.

Q Now, I want to call your attention back to Exhibit
31 in which in this telegram you said: "Retel 22nd.
Lerman's draft cherries paid. Other being paid tomor-
row."

That represents another draft for the cherries? A
Yes.

Q That had been paid, and then you said, "Other

being paid tomorrow." To what other did you refer?
A Raspberries.

Q How many other drafts were sent to Lerman for raspberries? A That would be hard, difficult for me to answer, because we don't get any clearance on how many drafts they put through the bank. There may be one draft put through there today for two or three orders.

* * * *

155 Q Now, you can't tell us what draft was being referred to? A No.

Q At that time. When Mr. Lerman told you he wanted to get raspberries and peas and strawberries—as a matter of fact, he told you he wanted anything frozen, didn't he? A I wouldn't say he told me he wanted anything, but he named some specific commodities that he told me he needed and needed badly.

Q Did you understand, Mr. Dietrich, you had authority to go out and buy any of those commodities, or was it your understanding you would locate the packer and present a specific transaction to Mr. Lerman for his approval? A I knew definitely we weren't going to go out and buy them, because we do not speculate. We do not buy and sell for our own account at any time. We were merely trying to bring Lerman and the packers together. We knew Lerman's requirements and tried to secure them for him from some packer.

Q Even though it was a seller's market, you were in effect soliciting purchase orders for Mr. Lerman? A Of course.

Q And nothing in that transaction led you to
156 believe that you were dealing with Mr. Lerman as other than a representative of a seller, and he being a buyer, isn't that correct? A Repeat that question again.

Q Was there anything in that conversation that indicated to you these transactions were to be other than

purchase and sale, with you representing the seller and Mr. Lerman being the buyer? A That is true.

* * * *

Q You never received a commission from Mr. Lerman for any of these purchases you made? A You mean from any purchase he made through me?

Q Yes. A No.

Q You had dealt with Mr. Lerman a number of times, hadn't you? A I have.

157 Q Do you know his standing in the trade? A Did I know his standing in the trade?

Q Yes. A Yes.

* * * *

Q Through July this strong seller's market continued, did it not, Mr. Dietrich? A That is going to be rather a difficult question for me to answer and give you the facts correct, after—

THE COURT: You can answer it yes or no, or say you don't know.

THE WITNESS: I really don't know.

* * * *

Recross-Examination

BY MR. GARNETT:

Q Mr. Dietrich, in writing up these orders confirming the sales and purchase of merchandise, you as
158 brokers send a copy to the seller, a copy to Lerman Brothers, and keep a copy yourself? A That is true.

Q That is the custom in the trade? A That is the custom.

* * * *

159

*Harry Lerman**Direct Examination*

BY MR. BERUEFFY:

Q Would you state your full name, and would you speak up so the young lady taking notes can hear you, and also the Court can hear you? A Harry Lerman.

Q Where do you live, Mr. Lerman? 1431 Somerset Place, Northwest.

Q What is your occupation? A Business, selling frozen foods.

Q What is your business address? A It is at Terminal Warehouse, 4th and B Streets, Southwest.

Q Calling your attention to July of 1946, were you then engaged in the frozen food business? A Yes.

160 Q Do you own the business yourself, or was it a partnership? A It was a partnership.

Q Who were the partners? A My two brothers, Samuel—

Q What other name? A Samuel Lerman and Mike.

Q And yourself? A That is right, Harry.

Q Does that partnership still exist? A No.

Q Who owns and operates the business now? A I do.

Q Mr. Lerman, calling your attention to the early part of 1946, that is, about May or June, did you have occasion to look for frozen red raspberries for use in that business? A Yes.

Q Mr. Lerman, I am going to show you a paper which has been marked Lerman's Exhibit No. 5 for Identification. Don't tell me what is in it but just tell me
161 what it is. A It is an order from the Giant Food Stores to procure this merchandise.

Q This paper appears to be dated March 22, 1946. A That is right.

Q Did you receive this paper from the Giant Food Stores in Washington on or about March 25, 1946? A That is right.

Q And that was the purchase order stating the requirements of that store of the merchandise which you sold? A That is right.

* * * *

MR. BERUEFFY: If Your Honor please, I offer it for the purpose of showing that the ultimate transaction was in good faith on Mr. Lerman's part and also for the purpose of showing that he could have sold this merchandise, which goes to the mitigation of damages.

MR. BEACH: We object to it. This is March of 1946.

THE COURT: Objection sustained.

BY MR. BERUEFFY:

Q During the months of April, May and June, Mr. Lerman, were you attempting to purchase frozen red raspberries? A Yes.

Q Coming now to the month of July, 1946, what was the condition of your stock on this particular item, frozen red raspberries? A Very low, limited.

Q What was the condition of the market? A Very strong.

Q Now, prior to this time, had you had dealings with Mr. W. J. A. Dietrich as a broker? A That is right.

Q And in those dealings had you discussed the possible purchase of frozen red raspberries? A That is right.

163 Q Calling your attention to the early part of July, 1946, did you have any conversation with Mr. Dietrich with reference to the purchase of frozen red raspberries from Fruit Processors, Inc.? A Well, I can't remember, but I asked him the market for raspberries, and he mentioned Fruit Processors.

Q Had you previously dealt with that company? A Never.

MR. BEACH: Will you fix a time?

BY MR. BERUEFFY:

Q About when was that conversation, Mr. Lerman?

A Probably early July.

Q Then did you subsequently purchase some raspberries from Fruit Processors, Inc.? A Well, not exactly. I gave an order to Bill Dietrich for them, and if and when they would be packed, I probably will consider it.

Q Calling your attention to Lerman's Exhibits No. 1 and No. 2, which has identified as a memorandum by Mr. Dietrich's firm, and which purports to call for 600 30-pound cans of red raspberries at 35 cents a pound, did you purchase those raspberries? A Yes.

Q Tell us, if you will, please, Mr. Lerman, how
164 that transaction came about? A Mr. Dietrich called me or was in the office, I can't recall exactly, and he told me about 600 cans of raspberries packed up and I purchased them.

Q He asked you if you wanted to buy them? A Certainly.

Q Certainly? A Yes.

Q And you did buy them? A Yes, sir.

Q Were they delivered to you? A Yes, sir.

Q Did you pay for them? A Yes.

Q How did you pay for them, Mr. Lerman? A By draft.

Q When was that draft paid with reference to the time it was presented to you? A Well, before the merchandise had arrived.

Q Did you delay the payment on that draft? A No.

Q Do you recall approximately when it was that the merchandise arrived? A I couldn't say.

Q Well, approximately? A Approximately early July, or probably later.

165 Q Now, there had also been some discussion about buying frozen red raspberries from this company packed in 1 and 2-pound packages? A That is right.

Q And with whom were those conversations? A Through Bill Dietrich.

Q I will now ask you to look at Lerman's Exhibit No. 1 and ask you if that is the memorandum which covers this transaction, as far as you are concerned, with the 1 and 2-pound packs? A That is right.

Q Did you ever personally sign any paper in connection with these raspberries? A Never.

Q Did you ever authorize Mr. Dietrich to sign these papers for you? A Never.

Q When were you notified that these raspberries had been packed? A Probably when the drafts started to arrive.

Q That was the first notice you had? A That is right.

MR. BEACH: Did you say when the first drafts arrived?

MR. BERUEFFY: He said when the drafts started to arrive.

* * * *

166 Q At the time those drafts started to arrive, had the 30-pound cans of cherries been delivered to you? A That is right.

Q What was the condition of those cherries, those raspberries? A Very poor.

Q And when you say very poor, what do you mean? A They were black, they were dirty, a lot of twigs, and they were in very poor condition. They were packed in second-hand tins.

Q Were you able to sell those raspberries? A Not all of them. We still have on hand.

* * *

Q When you were notified by this bank that drafts had been received by them from Fruit Processors, Inc., relating to the 2 and 1-pound packages, what did you do, Mr. Lerman? A I asked for an inspection.

Q And to whom did you make that request? A I wired to the Department of Agriculture in
167 Chicago.

Q And was that the Federal Inspection Service you wired to? A Yes.

Q Then what happened? A Then I received a wire that they wouldn't permit them to inspect the merchandise.

* * *

168 Q I am going to hand you a piece of paper which has been marked Lerman 6 for purposes of identification. Will you state what this is? A This is the wire to the Food Inspector.

Q Is it the wire or copy of the wire? A A copy of the wire.

Q Do you know who made that copy up? A This is by our bookkeeper, Vena Rebeck, who lives in Washington.

* * *

Q I will now ask you to take a look at Lerman's
169 No. 7 and ask you if that is a telegram? A That is right.

Q And did you receive that telegram in the regular course of your business? A That is right.

Q In response to a telegram you sent to the United States Department of Agriculture? A That is right.

Q As far as Lerman's No. 6 is concerned, was this copy made in your office at the time the wire was sent? A That is right.

MR. BERUEFFY: I offer them in evidence.

* * *

170 THE COURT: Objection overruled. It may be received. The Court thinks it is just another matter of determining whether it has weight or not.

* * * *

173 Q On the day you requested the inspection of this merchandise, did you have any frozen raspberries in stock? A No.

Q Did you have orders for such frozen raspberries? A Yes.

174 MR. BEACH: I object to that, if the Court please.

THE COURT: Objection sustained.

* * * *

I think I have a right to show, and I offer to show by this line of questioning that Mr. Lerman did need this merchandise, that he subsequently bought the merchandise, that he continued to look for other merchandise to replace this, because of his need for having frozen red raspberries. That goes not only to good faith but the question of their mitigation of damages, * * *

* * * *

176 Q In asking for an inspection of this merchandise, was it your purpose to determine the grade of the merchandise?

MR. BEACH: I object, if Your Honor please.

MR. GARNETT: That has just been excluded once.

THE COURT: Objection sustained.

MR. BERUEFFY: I offer to prove by answer to this question Mr. Lerman's only purpose in asking for an inspection was to determine whether or not this merchandise was merchantable, not to determine its grade.

* * * *

177 Q Did you thereafter purchase merchandise, frozen red raspberries, Mr. Lerman?

MR. BEACH: I object to that.

THE COURT: The objection is sustained.

You said "thereafter." I think you mean after the transaction we have been dealing with?

MR. BERUEFFY: I will make it more specific. After the 7th of August.

MR. BEACH: I object to that.

THE COURT: The objection is sustained.

MR. BERUEFFY: I would like to make my proffer of proof, Your Honor, which is that Mr. Lerman after that time went out and bought merchandise of this character at the same time from other people because he was not able to obtain this merchandise without waiving the right of inspection.

• • • • •
Cross-Examination

BY MR. BEACH:

Q Mr. Lerman, you got this telegram marked Lerman's No. 3 dated August 7, 1946, from Fruit Processors, did you not? A Do I have a copy?

Q Do you have this telegram? Do you recall that one? A Yes.

Q Do you recall that they advised you in this telegram you could not have an inspection because that was not part of the contract itself, that is right A That is so.

Q Did you ever reply to that telegram? A I did not.

Q Did you ever write directly to the Fruit Processors at any time after you got this telegram? A No, I did not.

Q You told Mr. Dietrich on two or three occasions you would pick up the drafts as, if and when you got the money? A No, I did not.

Q You deny that? A That is right.

Q He never had any conversation with you about when you would pick up a draft? A I couldn't say that.

• • • • •

179 Q You mean you don't have any recollection about whether Mr. Dietrich ever asked you if you would mind picking up the drafts aggregating \$21,000?

A I don't remember.

Q Did Fruit Processors ever ask you to pick up those drafts of \$21,000? A Whether they asked me?

Q You knew those drafts were at the bank, did you not? A That is right.

Q Mr. Dietrich never had any conversation with you? A I don't remember.

Q You don't remember or you can't remember when this telegram was sent asking for an inspection, can you? A What date? I don't remember.

Q Then when you got this telegram back which is dated August 5, 1946—

THE COURT: 5th or 8th?

MR. BEACH: Beg pardon?

THE COURT: What I had in mind was not the 8th.

MR. BEACH: August 5th.

THE COURT: All right.

MR. BEACH: That he got this telegram back which said that Swift & Company would not allow it until released by Fruit Processors.

180 BY MR. BEACH:

Q Did you write to the Fruit Processors after this? A I did not.

Q So you never made but one demand for an inspection, and it having been refused you did nothing else, is that correct? A That is right.

Q In the record, Mr. Lerman, from the Secretary of Agriculture there are Exhibits 27, 28 and 29 which are drafts dated July 10, 1946, July 12, 1946, and July 25, 1946. Certainly up until the time that this memorandum was written, which, I take it, was some place in August, you had never asked for an inspection, had you? A I can't—I don't understand you.

Q Let us take it one at a time. This draft, which is Exhibit 27, is dated July 10, 1946? A Yes.

Q You knew that draft was in the American Security & Trust Company, did you not? A Yes.

Q The draft, Exhibit 28, dated July 12, 1946? A Yes.

Q You knew that draft was at the American Security & Trust Company?

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181 Q Then there was a draft, Exhibit 29, dated July 25, 1946, which was at the American Security & Trust Company, and you knew that draft was there? A That is right.

Q Those drafts stayed there from July 10 up until you got the telegram from Fruit Processors, August 7, saying they were going to ask them to be withdrawn, is that correct? A Is this what?

Q They stayed at the American Security & Trust Company for payment? A Yes.

Q Until you got the telegram or day letter from Fruit Processors dated August 7, telling you if they were not paid by August 8 they were going to take them up? A That is right.

Q You left the drafts there all the time, and never asked for inspection, did you? A I asked for an inspection.

Q On August 5? A That is right.

THE COURT: What was it?

MR. BEACH: He said he asked for inspection on August 5.

BY MR. BEACH:

Q In other words, these drafts stayed at the
182 American Security & Trust Company from July 10 right on through, three drafts, and they stayed there until you received this telegram from Fruit Processors dated August 7, 1946, saying they were going

to recall the drafts on August 8, unless they were paid?

A That is right.

THE COURT: I couldn't hear you.

THE WITNESS: Yes.

BY MR. BEACH:

Q So that the drafts stayed there at the American Security & Trust Company from July 10 up until August 8? A Yes.

Q Then between that time and this you hadn't asked for an inspection until August 5? A I asked it prior, but the wire came back August 5. Probably I asked July 30, or 29.

Q Do you have anybody who can give you any idea as to when you sent this telegram? A I don't know.

Q Have you attempted to find out the date of this telegram? A No, I don't remember when it was sent.

Q Isn't it a fact as soon as you asked for this inspection you received immediately a reply from Fruit Processors on August 7 that you couldn't have one?

183 A That is right.

THE COURT: What is the answer?

THE WITNESS: That is right.

BY MR. BEACH:

Q You paid a draft to the Liberty National Bank, didn't you? A Yes.

Q And you paid one for the cherries, too? A That is right.

Q And that was in July, was it not? A Yes, sometime in July.

Q Beg pardon? A Yes.

Q Did you ever write to anybody with the Fruit Processors or to the American Security & Trust as to why you were not paying these drafts? A No.

Q You made no record of it at all, did you, sir? A That is right.

Q You remember the 30 cans, the 30-pound cans that you purchased? A That is right.

Q There were 600 of them, were there not? A That is right.

Q And, as a matter of fact, you, together with Mr. Dietrich inspected those, you and Mr. Dietrich together inspected those? A No, indeed.

Q Do you mean to tell us you and Mr. Dietrich did not inspect the contents of those 30-pound cans? A When, prior or after?

Q Before you purchased them. A I was in Washington.

Q After you purchased them? A Yes, I inspected them, myself.

Q Didn't you tell Mr. Dietrich at that time that the fruit was beautiful? A No, I don't remember that.

Q You remember it was good? A It was not good.

Q Did you tell Mr. Dietrich then it was not good? A As far as I know, I did.

Q Don't you know? A I did tell him.

Q You were paying for it. A Well, a draft comes in, you pay for it. They got the money, you got the raspberries.

Q Did you ever make any complaint, ask for any refund? A I did tell them about it, to Mr. Dietrich.

Q You told Mr. Dietrich the berries were no good, you wanted a refund? A I said they were poor.

Q Poor? Did you say you wanted a refund? A I didn't say I wanted a refund. I said they were very, very poor.

Q You told him that. Did he and you inspect them? A That is right.

Q That was the early part of July? A Sometime?

Q You had the drafts on you on the 10th, 12th and 25th thereafter? A That is right.

Q Now, the record shows that you paid for the 30-pound cans on the 16th of July. Do you recall that?

• • • •

186 MR. BERUEFFY: I will stipulate this was received the 13th and paid the 16th.

MR. BEACH: It is stipulated between the parties the payment of 600 cans, 30-pound cans was received on the 13th and paid on the 16th of July, 1946.

BY MR. BEACH:

Q Mr. Lerman, there has been some testimony here with reference to the 1-pound packages in Johnson City, I believe it was Tennessee, do you recall that? A Yes.

Q Did you request that those packages be sent to the Fruit Processors? A Never.

Q How did they get there, do you know? A I don't know.

187 Q You haven't got the slightest idea? A I don't know.

Q Then the stamps you saw exhibited here, which form part of this record, did you have those made, sir? A Made by myself. Yes, I made them.

Q Did you send those to Fruit Processors? A Never.

Q You have no idea how they got there? A I don't have an idea how they got there.

Q Have you attempted to find out how the packages got to the Fruit Processors to pack these raspberries? A I didn't.

Q You never have? A No.

Q You have never made demand on them for any refund to you for the value of those packages they didn't use? A No.

Q You knew they were there, didn't you? A I didn't know until I was notified they were there.

Q Who notified you? A The bank notified me with the draft some packages were there and my own cartons.

Q The draft showed you those packages were there? A Yes, pound packages.

188 Q What did the draft say? A Pound packages.

Q Said what? A Pound packages.

Q How did you first learn that these empty packages had been sent from Tennessee to Michigan to pack your fruit in? A I think by Bill Dietrich.

Q Do you know when you were advised of that? A I don't remember what date.

Q Do you have any knowledge as to when the rubber stamp was sent to the Fruit Processors? A No, I do not.

Q You have no idea how they got there? A Never. I don't know how they got there.

Q Do you know when they were purchased? A Purchased by me.

Q Beg pardon? A Purchased by me. Cartons, or stamps?

Q Stamps. A By me.

* * * *

Q When? A I don't know when? Probably in early May.

* * * *

189 Q I show you Exhibit No. 25 in the bill of complaint that purports to be two stamps, one for 12-ounce net weight, Frostee, another for 16-ounce net weight, Frostee. Are you familiar with those stamps, sir? A Yes, sir.

Q Those stamps were ordered by you, were they not? A Yes, sir.

Q They were ordered from Hay Rubber Stamp Company here in Washington? A Something like that.

Q What? A Something like that.

Q What was the purpose of using those
190 stamps? A To pack raspberries and strawberries.

THE COURT: Do what?

THE WITNESS: To pack raspberries and strawberries.

BY MR. BEACH:

Q Don't you mean you used these stamps to stamp on the pack? A That is right.

Q Of the frozen raspberries put up by Fruit Processors? A No. No, I do not.

Q What were they gotten for? A Went to Johnson City, Tennessee.

Q Is that the same place the small 1-pound packages went? A That is right, sir.

Q Then those small 1-pound packages were shipped out to Michigan? A I don't know.

Q You don't know? A No, sir.

Q You don't know to this day whether they were or weren't? A Positively not.

Q Were these rubber stamps sent to Johnson
191 City, Tennessee? A I don't know.

Q I thought you just said they were obtained for the purpose of stamping of the Johnson City, Tennessee, product. A That is right, sir.

Q Were they ever sent there? A No. I took them myself, there. I went to Tennessee by myself. I stayed for two weeks.

Q When was that? A Sometime in May.

Q You have no knowledge those stamps went out to Michigan to Fruit Processors? A I have no knowledge.

Q Haven't any knowledge of it at all? A No, sir.

Q You received, did you not, the complaint from the Secretary of Agriculture when this matter came up before the Agricultural Department? A Yes, sir.

Q But the stamps you obtained from the Hays Rubber Stamp Company here in Washington were taken by you personally? A Yes, sir.

Q To Johnson City, Tennessee? A That is right.

Q And you went there in May? A That is right.

192 Q Were you there in June? A No.

Q Well, I hand you what counsel has been good

enough to hand me, a receipt dated June 12, 1946, which is a receipt to you of stamps made, three stamps made, \$7.80. Did you take those to Johnson City? A I can't recall.

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Q You weren't in Johnson City in June, were you?
A No, sir.

Q And your orders came for this particular fruit in July. Can you tell me whether or not these stamps were taken by you to Johnson City, or were they sent to Michigan? A Maybe I sent them to Johnson City.

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Redirect Examination

BY MR. BERUEFFY:

Q Mr. Lerman, did you ever send the raspberry stamp to St. Joseph, Michigan? A No, I never did.

Q Did you ever authorize anybody to send it
193 there for you? A No.

Q After the cartons were sent to Johnson City, Tennessee, was any frozen fruit packed in them there?
A Yes.

Q What kind of frozen fruit? A We packed strawberries there in Johnson City.

Q Did you pack all you intended to pack? A No, indeed.

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Q When you went to Johnson City, did you
194 have an arrangement to pack raspberries there?
A Yes.

Q When did you expect the Johnson City raspberries to come in? A Probably in July, June and July.

Q Did you actually pack any raspberries in Johnson City? A No, we did not.

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Q Did you have any cartons left over in Johnson City? A Yes.

Q What was your intention with reference to those? A To pack raspberries.

* * * *

MR. BERUEFFY: If Your Honor please, I would like to inquire if Your Honor would take judicial
195 notice of Section 46.24(i) of the Code of Federal Regulations, which is published in the Federal Register, and the section I refer to is called Trade Terms and Definitions, and it provides as follows:

“(i) ‘F. o. b. (for example, (f. o. b. Laredo, Tex.,’ or even ‘f. o. b. California’) means that the produce quoted or sold it to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition (see definitions of ‘suitable shipping condition,’ paragraphs (j) and (k) of this section), and that the buyer assumes all risk of damage and delay in transit not caused by the shipper, irrespective of how the shipment is billed. The buyer shall have the right of inspection at destination before the goods are paid for, but only for the purpose of determining that the produce shipped complied with the terms of the contract or order at time of shipment, subject to the provisions covering suitable shipping conditions. Such right of inspection shall not convey or imply any right of rejection by the buyer because of any loss, damage, deterioration, or change which has occurred in transit.”

* * * *

198 THE COURT: The Court should take judicial notice of this in the same sense that the Court would take notice of a statute.

* * * *

199

Harry Lerman

* * *

Further Direct Examination

BY MR. BERUEFFY:

Q Mr. Lerman, what was your intention with respect to this merchandise when you requested an inspection by the United States Department of Agriculture? A I didn't want to receive the merchandise if I didn't know the quality of the merchandise.

THE COURT: I can't hear.

THE WITNESS: I didn't know the quality of the merchandise.

* * *

200 Q What did you intend to find out about this merchandise?

* * *

THE WITNESS: I wanted to find out that this merchandise was fit for human consumption and fit for resale.

* * *

201

William J. A. Dietrich

* * *

Direct Examination

BY MR. GARNETT:

Q Mr. Dietrich, after the draft was paid on the 30-pound cans of frozen raspberries and they were delivered to Mr. Lerman, did you and he examine them together? A We did.

Q Did you come to any agreement as to the condition of them? A The only comment on the condition of the raspberries at the time was there was a few cans arrived which were slightly twisted, which could happen

in transit. There was a no comment, no protest
202 from him as to the general quality and in my opinion it was a good delivery.

Q Did he agree with you that was a good quality? A Yes.

Q In the subsequent conferences with him when he promised to pay for the first and second shipments, did he complain of the quality? A Never, at any time.

Q On the contrary, he promised to pay the drafts, said they were held up, but he would pay them in a few days? A I would say we received that promise from him at least five or six times, either in person or over the telephone.

* * * *

203 Q What I want to know is was there any protest as to the condition of the raspberries or any refusal of the raspberries between July 16 and July 23? A Definitely not.

* * * *

Cross-Examination

MR. BERUEFFY:

Q Mr. Dietrich, when did you make your examination? A I would say about two days after that shipment arrived in Washington.

Q Where did you go there? A In Lerman's place.

Q How many cans did you examine? A He brought out on the platform, I would say, roughly, about 10 or 12 cans.

Q And looked at those? A Yes.

Q You didn't look at the other 588 cans? A You never do, when you are sampling.

Q As a matter of fact, Mr. Dietrich, do you
204 know when the drafts were received in Washington? A Do I know when the drafts were received in Washington?

Q Yes. A No.

Q Do you know when they were sent from St. Joseph, Michigan? A No.

Q Do you know when Mr. Lerman's first request for an inspection to you was made? A As I recall, it was around the first of August. It might have been the second or third. I don't know. It was merely in the form of conversation.

Q Might have been the 31st of July, too, mightn't it? A Could have been.

Q Could have been the 30th of July, couldn't it? A I would say it was around the first of August.

Q Well, one of those dates? A 31st of July or the 2nd of August.

* * * *

233 THE COURT: The Court finds for Fruit Processors, Inc., in the sum allowed by the Secretary, less \$632.62. I have not made that computation.

MR. GARNETT: \$13,977.93.

THE COURT: Very well. The Court will ask counsel for Fruit Processors to submit findings of fact and conclusions of law. Certain findings should be included. I wish to include as far as appropriate or necessary to this proceeding the findings made by the Secretary.

The Court specifically finds that the contract claimed by Fruit Processors has been proved and is binding upon Lerman.

The transaction is not within the statute of frauds.

The Dietrich Company was the joint broker for Lerman and for Fruit Processors. The memorandum of sale was in writing and signed by the joint brokers acting for both parties.

Lerman received, accepted and paid for one shipment of frozen raspberries and one shipment of frozen cherries under the terms of the contract. There was a partial performance by the Fruit Processors and
234 acceptance by Lerman.

The goods were frozen especially for the use of Lerman. They were stamped with Lerman's brand and name with the stamp provided by Lerman for that purpose. This stamping, if nothing else, made the goods unsuitable for use of the trade except by Lerman in his trade.

Lerman claims that he had the right of inspection before making payment. If he had such right it was not by virtue of the contract, but wholly because of the Secretary's Regulation 26.24(i).

If, as claimed by Lerman, he had the right of inspection, the right existed for a reasonable time only after notice of arrival of the goods at the point of destination.

At this point I call attention to the Secretary's Regulation 46.2(q) and (r). (q) reads:

" 'Rejection without reasonable cause' means the act of any person who had purchased or offered to handle on consignment or otherwise for or on behalf of another produce in cars (1) of refusing or failing to accept such produce within a reasonable time or (2)", and so on.

(r) defines reasonable time. It reads:

"Reasonable time as used in Paragraph (q) of this section means with respect to rail shipments not to exceed 24 hours after receipt of notice of
235 arrival of the produce."

Now, I understand this shipment was by car.

MR. BEACH: Car.

THE COURT: The regulation goes on:

"With respect to truck shipments, not to exceed 6 hours after receipt of notice of arrival of the produce."

Then, I call attention also to Sub-section (s) under that regulation:

"Acceptance includes any action by a purchaser which is inconsistent with the rejection of produce."

The Court finds that Lerman rejected the shipment without reasonable cause in refusing to accept the produce within a reasonable time, and in any event in neglect-

ing to make his request for inspection within a reasonable time after notice of arrival of the produce at the destination.

The Court holds that the claim of the right to inspect was not made by Lerman in good faith and is, in fact, an afterthought.

In considering the question of reasonable time, aside from the definition which is placed upon the term by the Secretary in this regulation, the usual rule is that the reasonableness depends upon the circumstances of the particular case, and here you are dealing with perishable foods. The mere fact that these products were
236 shipped to warehouses where they undoubtedly would be properly cared for has no particular significance in determining the reasonableness of the time.

Now in support of some of these conclusions I rely upon the Departmental interpretation of the Act which has been referred to by Colonel Garnett. There the Secretary said in most transactions the broker acts as the agent of both buyer and seller, and he describes that there are the two types of so-called confirmation.

The Court thinks that this transaction as shown by the evidence is entirely consistent with the interpretation placed upon the Act by the Secretary.

Let the suggested findings be prepared and submitted for settlement.

• • • •

323 Filed Jul 24 1950 Harry M. Hull, Clerk

Lerman Ex. 1 for Identification

W. J. A. DIETRICH CO.
Bulk, Institutional & Consumer Packages
Dried and Frozen Foods
Tower Bldg., Baltimore St. & Guilford Ave.
Baltimore 2, Maryland

Lexington 1634-35

T. W. X. BA 576

Sold to: Lerman Brothers

4th St. & Va. Ave.

Washington 4, D. C.

Remarks:

For account of: FRUIT PROCESSORS INC.

Terms: S/D thru: American Security & Trust Co.

7th & E Sts., S. W.,

Washington 4, D. C.

F. O. B. Michigan

No. 114

Date: 7/5/46

Quantity	Size	Brand and Commodity	Price Per
1500 Cases	12/2#	Frozen Red Raspberries 5x1	.40 lb.
1500 Cases	24/16 oz.	" "	" S.A.P.

Sales Memorandum

Subject to confirmation of seller. This memo becomes void when sale is covered by contract. If incorrect advise immediately.

W. J. A. Dietrich Company
per /s/ W. J. A. D.

324 Filed Jul 24 1950 Harry M. Hull, Clerk

Lerman Ex. 2 for Identification

W. J. A. DIETRICH CO.

Bulk, Institutional & Consumer Packages

Dried and Frozen Foods

Tower Bldg., Baltimore St. & Guilford Ave.

Baltimore 2, Maryland

Lexington 1634-35

T. W. X BA 576

Sold to Lerman Brothers

4th St. & Va. Ave.

Washington 4, D. C.

Remarks: Fruit Processors will draw draft and transfer to Lerman in warehouse at Chicago. Stock will be ordered out at a later date by WJADietrich Co. for customer, as soon as customer turns over to WJADietrich Co. delivery order.

For account of: FRUIT PROCESSORS INC.

Terms: S/D thru: American Security & Trust Co.

7th & E Sts., S. W.,

Washington 4, D. C.

F. O. B. Chicago Warehouse, packer to pay 1st month's storage.

No. 156

Date: 7/11/46

Quantity	Size	Brand and Commodity	Price Per
600 Cans	30#	Frozen Red Raspberries 5x1	.35 lb.

Sales Memorandum

Subject to confirmation of seller. This memo becomes void when sale is covered by contract. If incorrect advise immediately.

W. J. A. Dietrich Company
per /s/ W. J. A. D.

325 Filed Jul 24 1950 Harry M. Hull, Clerk

Lerman Ex. 3 for Identification

Western Union

A. N. Williams, President

Newcomb Carlton, Chairman of the Board

J. C. Willever, First Vice-President

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination.

WT52 DL PD—STJOSEPH MICH 7 1240P

1946 Aug 7 PM 1 42

LERMAN BROS—

—4 ST AND VIRGINIA AVE—

OUR BANK ADVISES THAT YOU HAVE FAILED TO PAY SIGHT DRAFTS PRESENTED AT YOUR DESIGNATED BANK FOR PAYMENT OF ONE POUND AND TWO POUND PACKAGES OF FROZEN RED RASPBERRIES PACKED BY US ON YOUR ORDER SUBMITTED THROUGH W J A DIETRICH COMPANY AS BROKERS STOP INSPECTION OF THE PRODUCT AFTER PACK WAS NOT A CONDITION OF THE ORDER OFFERED TO US OR CONFIRMED BY US AT THE TIME OF SALE STOP CONSEQUENTLY WE CANNOT GRANT YOU THE RIGHT OF INSPECTION NOW AS A CONDITION OF PAYMENT FOR THIS MERCHANDISE PACKED FOR YOU STOP YOU HAVE WITHHELD PAYMENT OF THE SEVERAL DRAFTS AN UNREASONABLY LONG TIME THEREFORE WE INSIST THAT DRAFTS BE PAID BY CLOSE OF BANK TODAY OR THURSDAY AUGUST 8TH OR WE SHALL REQUEST THE AMERICAN SECURITY AND TRUST CO TO RETURN THE

326 DRAFTS TO US SELL THE MERCHANDISE AT THE BEST POSSIBLE PRICE AT THIS

TIME AND HOLD YOU RESPONSIBLE FOR ANY
AND ALL LOSS TO OURSELVES BELOW THE
AMOUNT OF THE SEVERAL DRAFTS AND IN-
CLUDING COSTS OF RESALES AND COLLECTION
OF DAMAGES STOP PLEASE UNDERSTAND THAT
THIS ACTION IS REGRETTABLE ON OUR PART
BUT SINCE THIS PACK OF RASPBERRIES WAS
PUT UP ON YOUR SPECIAL ORDER ONLY WE MUST
TAKE ACTION TO PROTECT OUR INTEREST
—FRUITPROCESSORS INC C A ELDER.

331 Filed Jul 24 1950 Harry M. Hull, Clerk

Lerman Ex. 6 for Identification

Mr. M. A. Austin
Room 301
1421 S. Aberdeen St.
Chicago, Ill.

Please inspect at Swift Warehouse, Raspberries, trans-
fers # 378 - 510 - 550. Wire collect immediately results.
Send papers later.

Lerman Bros.

Swift & Co. Warehouse
Chicago, Ill.

Permit U. S. D. A. inspector to examine Rasb all 3 lots.

* * * *

332 Filed Jul 24 1950 Harry M. Hull, Clerk

Lerman Ex. 7 for Identification

Western Union

A. N. Williams, President

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination.

WT72 23 COLLECT—SBG CHICAGO ILL 5 120P
LERMAN BROS—

—4 ST AND VIRGINIA AVE—

SWIFT AND COMPANY WILL NOT ALLOW SAM-
PLING RASPBERRIES UNTIL RELEASED BY
FRUIT PROCESSORS INCORPORATED ST JOE
MICHIGAN ALSO CANNOT LOCATE LOT 378—

ALBERT C RAUCH PROCESSED PRODUCTS IN-
SPECTION.

• • • •

No. 10,737

BRIEF FOR APPELLEE AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY LERMAN, MYER LERMAN and SAMUEL LERMAN,
Co-partners trading as LERMAN BROTHERS, *Appellants*,

VS.

FRUIT PROCESSORS, INC., a corporation, *Appellee*.

**Appeal from the United States District Court
for the District of Columbia**

United States Court of Appeals _____

*For the
District of Columbia Circuit*

FILED NOV 10 1950

Joseph W. Stewart

CLERK

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Of Counsel
St. Joseph, Michigan

LESLIE C. GARNETT,
SAMUEL F. BEACH,
331 Tower Building,
Washington 5, D. C.,
Attorneys for Appellee.

APPELLEE'S QUESTIONS PRESENTED

In the opinion of the appellee, the questions are:

1. Whether this Court will disturb the concurring findings of fact made by the Secretary of Agriculture upon whom Congress conferred authority to enforce the Perishable Agricultural Commodities Act, and by the United States District Court for the District of Columbia upon appeal from the Secretary's Order.
2. Whether the contract for the purchase of frozen fruits to be packed is enforceable (1) where an agreement was made at the request of the buyer by the broker, who signed memoranda of sales in triplicate, as provided in the Regulations of the Secretary of Agriculture, and furnished a copy each to the buyer and seller; (2) where the buyer accepted and paid for one carload of frozen cherries and 600 cans of 30-lb. frozen raspberries, part of the order; and (3) where the buyer furnished containers for the fruit to be especially packed and rubber stamps upon which the buyer's brand was stamped upon the packages.
3. Whether in the absence of an agreement permitting inspection, the buyer had the right on August 6, 1946, to demand inspection, after the fruit had been packed and frozen and in cold storage, where the terms of sale were net cash, F.O.B. Michigan or F.O.B. Chicago, sight draft, with warehouse transfer order attached through buyer's bank, and sight drafts were sent to buyer's bank on July 10th, July 12th and July 25th, 1946, and buyer had frequently promised to pay the same.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,737

HARRY LERMAN, MYER LERMAN and SAMUEL LERMAN,
Co-partners trading as LERMAN BROTHERS, *Appellants*,

VS.

FRUIT PROCESSORS, INC., a corporation, *Appellee*.

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

APPELLEES' COUNTER-STATEMENT OF THE CASE

The appellants will hereafter be called "Lerman," and the appellee "Fruit Processors."

On January 5, 1948, Fruit Processors filed a complaint before the Secretary of Agriculture against Lerman under the provisions of the Perishable Agricultural Commodities Act of 1930 (7 U. S. C. 499a, et sq.), alleging a violation of Section 2 of said Act, which provides as follows:

"Sec. 499b. Unfair conduct; what constitutes
 " * * *

"(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer; * * *."

The complaint alleged that Fruit Processors, by contract in writing on July 5, 1946, sold to Lerman 36,000 pounds of frozen red raspberries at a total price, sight draft, F. O. B. Chicago, of \$31,140.00, which Lerman without reasonable cause refused to accept upon delivery F. O. B. Chicago. A copy of the complaint was served as provided by the Act upon Lerman, who made no answer nor defense thereto. (J. A. 5-12).

On July 7, 1948, the Secretary entered a "Preliminary Statement Findings of Fact, Conclusions and Order" (J. A. 39-43), finding that Lerman's failure and refusal to accept and pay for three shipments of frozen raspberries delivered cold storage at Chicago for Lerman were in violation of Section 2 of the Act, and gave judgment that Lerman should pay to Fruit Processors as reparation \$14,610.55, with interest at 5% from August, 1946 until paid (J. A. 43).

On August 4, 1948, (J. A. 43) Lerman filed a petition with the Secretary for rehearing and reconsideration of this proceeding, and on August 19, 1948, Lerman's request that the order of July 7, 1948, awarding reparations to Fruit Processors, be set aside was denied, and the petition for reopening and reconsideration was dismissed by the Secretary, (J. A. 46-47).

On September 17, 1948, (J. A. 2) Lerman filed in the court below a petition for review of reparation order under the provisions of Section 7 of the Perishable Agricultural Commodities Act, 7 U. S. C., 499g (c). This petition alleged the following grounds for review of the

Secretary's Order and to defeat the right of Fruit Processors to recover damages:

- (a) The petitioner never entered into contract for purchase of any specific quantities of raspberries;
- (b) While the raspberries were in a warehouse in Chicago, the complainants requested the Department of Agriculture to inspect the same, but Fruit Processors refused to permit such inspection;
- (c) The Fruit Processors, at the time of the refusal of the petitioner to purchase, neglected to take reasonable steps to prevent damage to them as a result of their refusal to purchase said raspberries, (J. A. 2-3).

The Fruit Processors answered this petition denying the allegation that there was no contract, alleging that inspection was not one of the terms of the sale and denying that it failed to take reasonable and necessary steps to prevent damage resulting from the refusal of Lerman to pay for the merchandise in question, (J. A. 45).

On March 14, 1950, pre-trial proceedings were had before Chief Judge Bolitha J. Laws in the District Court. At these proceedings, Lerman contended that the Order of the Secretary of Agriculture that they pay \$14,610.55, plus interest at 5%, was erroneous for the following reasons:

1. There was no contract to buy any specific amount of frozen fruit because the contract was subject to approval as to price which was not fixed by reason of Fruit Processors not permitting inspection.
2. That the contract was required to be in writing under the statute of frauds.
3. That Fruit Processors' refusal to permit inspection constituted a reasonable cause for not accepting the merchandise.
4. That Fruit Processors did not sell the products within reasonable time and failed to mitigate damages.

Fruit Processors, in these pre-trial proceedings, relied (1) specifically upon the findings of fact made by the Secretary of Agriculture; (2) that Dietrich, the broker, acted as agent for both parties in the transaction; that the contract specified the prices and was not subject to approval by Lerman; that the shipments of merchandise were not made subject to inspection, and that, in any event, inspection was available at the time of packing products desired; (3) that the statute of frauds was not applicable in that the merchandise was specifically ordered by Dietrich, acting as agent for both parties; that there was partial performance of the contract by delivery and acceptance of part of the merchandise; and (4) that Fruit Processors took reasonable steps to dispose of the property and repeatedly offered said property to Lerman and advised them when sales would be made. (J. A. 47-48). At the trial and after the examination of four witnesses, all produced by Lerman, and the production of more than twenty documents (J. A. Index, pages 1, 2, 3), the Court adopted the findings of fact as certified by the Secretary (J. A. 49-52), and made additional findings as follows:

"16. The Dietrich Company was the joint broker for Lerman Brothers and Fruit Processors, Inc. The memoranda of sales were in writing and signed by the joint broker acting for both parties. The memoranda of sales were executed in triplicate by the broker, one copy thereof going to the seller, one copy to the buyer and the broker retaining one copy, as provided in the regulations of the Secretary of Agriculture.

"17. Lerman Brothers received, accepted and paid for one shipment of frozen raspberries and one shipment of frozen cherries under the terms of the contract. This was a partial performance by Fruit Processors, Inc. and acceptance by Lerman Brothers.

"18. The fruit was specially frozen for the use of Lerman Brothers and placed in part in containers furnished by Lerman Brothers, who also furnished a rubber stamp for affixing Lerman Brothers' brand and name on the packages.

"19. The contract, being sight draft f. o. b., did not provide for inspection, but if, as claimed by Lerman Brothers, they had the right of inspection, the right existed for a reasonable time only after the notice of arrival of the goods at destination; and they neglected to make request for inspection within a reasonable time, which the regulations of the Secretary provide is six hours after delivery by truck. The request to inspect was not made by Lerman Brothers in good faith, but was, in fact, an afterthought.

"20. The Court finds that Fruit Processors, Inc., not having used all of the containers furnished by Lerman Brothers for packing said fruit and having sold the remaining containers for \$632.62, Lerman Brothers are entitled to a credit of this amount of their indebtedness."

The Court also made the following Conclusion of Law:

"1. While the Statute of Frauds is not specially pleaded, this transaction is not within the Statute of Frauds.

"2. Lerman Brothers had no right of inspection at the time requested.

"3. Lerman Brothers' failure and refusal to accept and pay for the three shipments in question were in violation of Section 2 of the Perishable Agricultural Commodities Act of 1930, 7 U. S. C. 1940 ed. 499a, et seq.

"4. The Court finds for Fruit Processors, Inc. in the sum allowed by the Secretary of \$14,610.55, less \$632.62, or \$13,977.93, with interest thereon at 5% per annum from August 1, 1946 until paid."

On May 19, 1950, judgment was entered for Fruit Processors in the sum of \$16,643.07 and for Garnett & Beach, Attorneys for Fruit Processors, in the sum of \$1,650.00 as attorneys' fees (J. A. 54). A new trial was denied June 1, 1950, (J. A. 57). The bond theretofore given under the statute was approved June 8, 1950, as a supersedeas bond (J. A. 57). This appeal is from the judgment of May 19, 1950.

THE FACTS

Lerman was licensed under the Act (J. A. 40) to sell frozen food as was Dietrich, a Baltimore broker, dealing in dried and frozen foods (J. A. 104). Dietrich was solicited by Lerman to procure for him particularly frozen red raspberries. Beasley was an employee of Dietrich (J. A. 91). Dietrich, before this transaction, had dealt with Lerman many times. He had not dealt prior to this transaction with Fruit Processors (J. A. 108). Dietrich estimated that he had had before this transaction "possibly 20, 30 maybe 40" transactions with Lerman, (J. A. 112). Lerman had asked him to get for him raspberries and strawberries, the broker's hardest job being trying to find merchandise for the buyers. (J. A. 114).

Lerman testified (J. A. 122) he was attempting to purchase frozen red raspberries during April, May and June, and the market "was very strong." Beasley, an employee of Dietrich, was sent in early July, 1946, to St. Joseph, Michigan, by Dietrich to secure raspberries for Dietrich's customers, among others, Lerman, leaving Baltimore on July 1st and driving out (J. A. 92). Some time between July 2nd and July 8th, 1946, Beasley talked to Lerman on the telephone from the private office of Elder, the manager of Fruit Processors, (J. A. 95), and ordered, July 5th, for Lerman

1500 cases	12/2#	Frozen Red Raspberries
1500 cases	24/16 oz.	" " "
600 tins	30#	" " "
1500 cans	30#	RSP Montmorency Cherries.

The sales' memoranda for the red raspberries is Exhibit 1 with the Fruit Processors' complaint before the Secretary (J. A. 13). The memorandum of sale of the cherries, dated July 5, 1946, is contained on the second page of Exhibit 1, which was omitted in the joint appendix, but is filed herewith as Appendix 1. The cherries

were sold and paid for at \$10,000.00, (J. A. 77). The deal was closed as one unit (J. A. 100) and the price agreed upon the day the order was taken, (J. A. 87). This order was 'phoned by Beasley to Dietrich and confirmed by four sales memoranda (J. A. 13, 142 and 143 and App. 1). The sales memoranda covered the raspberries and provided terms s/d (sight draft) through American Security & Trust Company, F. O. B. Michigan, or F. O. B. Chicago warehouse. The 600 tins of frozen red raspberries were frozen and in Chicago on July 5, 1946, when Beasley went to the office of Fruit Processors and gave the order. These 600 cans were shipped July 11th, and paid for by draft in the amount of \$6,300.00. On the same date, July 5, 1946, and as a part of the unit order, Fruit Processors sold Lerman, through Beasley, a car-load of cherries for \$10,000.00. The sight draft for this shipment of raspberries was paid July 16, 1946, (J. A. 132) and for cherries was paid July 23rd. (J. A. 77-78). All of the orders and deliveries were accepted and paid for by Lerman except the one and two-pound specially packed packages.

On July 10, 1946, Fruit Processors issued a sight draft against Lerman for \$13,565.76; on July 12th, issued a sight draft against Lerman for \$2,358.72; and on July 25th, issued a sight draft for \$6,892.80, aggregating \$22,817.28, all for frozen goods delivered F. O. B. Chicago. These drafts were not paid nor returned on August 7, 1946, (J. A. 78), although Lerman promised Beasley to pick them up (J. A. 101). In response to a telegram from Fruit Processors to Dietrich, advising that the invoice drafts were not paid and asking the cause, Dietrich advised Fruit Processors on July 23rd: "Retel 22 Lermans Draft Cherries Paid Other Being paid tomorrow." (J. A. 37).

Dietrich was put on as a witness for Lerman. He testified that he sent this telegram after Mr. Lerman's assurance that the draft would be paid, and that he had had

two or three personal conversations with him and a number of conversations over the 'phone, and he usually gave the excuse that he was a little bit pressed for money and would pick it up in a day or so. (J. A. 113).

Lerman testified (J. A. 121-137). He admitted that he was first notified that the raspberries he had purchased through Mr. Dietrich has been packed when the drafts started to arrive; that these drafts stayed in the American Security & Trust Company from July 10, 1946 up until he got the telegram from the Fruit Processors August 7, 1946, saying that if they were not paid by August 8th, the Fruit Processors were going to recall these drafts on August 8th, (J. A. 129). He testified that he knew the drafts were at the American Security & Trust Company, and that "the bank notified me with the draft some packages were there and my own cartons," (J. A. 132), and that he had never asked inspection until August 5th.

Lerman desired these red raspberries to be packed and frozen in one and two pound containers. The Fruit Processors had no one-pound containers. These one-pound containers came from Johnson City, Tennessee, (J. A. 83). Lerman wanted strawberries and arranged with Dietrich to have them packed at Harman Frozen Food Plant in Johnson City, Tennessee. Lerman sent the containers there for packaging this frozen food, sold to Lerman for the people in Tennessee, and had an understanding with Dietrich that all the containers that had not been used at Johnson City were to be shipped up to Fruit Processors to be used in packing the one-pound raspberries, and they were shipped. (J. A. 112-113). Lerman admitted that they did not pack raspberries in Johnson City, and it was his intention that the cartons left over should be used to pack raspberries. (J. A. 134).

Two rubber stamps for stamping the packages with the name "Froste," Lerman's brand, were received by Fruit Processors. These stamps were filed as an exhibit in the

cause. Lerman admitted that he ordered the stamps (J. A. 133) from the Hay Rubber Stamp Company in Washington, and they were to be used to stamp the raspberries and strawberries with the brand name on the package. He denied knowledge that these stamps went out to Fruit Processors. He stated that he took them personally to Tennessee some time in May; and that he was not there in June. When confronted with the receipt for the stamps, dated June 12, 1946, for \$7.80, he could not then recall whether he took them to Johnson City, Tennessee, or not.

Elder, the general manager of Fruit Processors, testified that the stamps with the "Froste" brand on them, received by Lerman, did not come from Johnson City, Tennessee, although the two-pound cartons did, (J. A. 83); that the stamps came in the mail, and the containers were shipped by truck; that Fruit Processors did not order the stamps or authorize Lerman to order either the containers or the stamps. Elder further testified (J. A. 87) that he received 40,000 cartons from Johnson City, Tennessee; that he did not use them all, but that he sold the containers that were left over for a net cost of \$632.62 (J. A. 89). This sum was credited by the Court on the judgment awarded by the Secretary of Agriculture. Dietrich, the broker, testified (J. A. 116) that a rubber stamp with Lerman Brothers' private brand was forwarded to Fruit Processors for use on these packages; that Lerman told him he wanted his label on the cartons; that he had one rubber stamp made up and sent off to Harman Brothers to be used on the packages and a similar stamp was sent to Fruit Processors for the same purpose. (J. A. 116-117).

On the question of the mitigation of damages, Elder testified that after August 8th or 10th, 1946, when the market had collapsed, and after he informed Lerman that these goods would be sold at his risk and cost, he asked their brokers, representing them throughout the country, to sell them. He contacted a number of their big cus-

tomers, naming them; that Mr. Dietrich sold some of them for Fruit Processors; and that they were trying hard to save everything out of the wreck that they could, but there was no demand for one and two pound boxes of raspberries (J. A. 79).

SUMMARY OF THE ARGUMENT

The concurring findings of fact made by the Secretary of Agriculture, upon whom Congress conferred the authority to act, and upon appeal by the United States District Court for the District of Columbia, will not be disturbed by this Court.

The sale of frozen fruits by Fruit Processors to Lerman, made through the broker, Dietrich, fully met the requirements of the statute of frauds and was in conformity with the regulations, which recognize that in most transactions, the broker acts as the agent of both buyer and seller. As provided in these regulations, the broker's standard memoranda of sale in this case was prepared in triplicate, one going to the buyer, one to the seller and the other retained by the broker, (App. 26).

The fruit not accepted was especially packed for Lerman in containers furnished by him and stamped with his name and brand. The other part of the order was accepted and more than \$16,000.00 paid therefor. In any event, these facts bring this transaction under the exceptions in paragraphs 2 and 3 of the statute of frauds, (App. 23).

The terms of sale were net cash, sight draft, with warehouse transfer order attached through the American Security & Trust Company, Washington, D. C. Therefore, the buyer was not entitled to examine the goods before payment of the sight draft in the absence of an agreement permitting such examination. *D. C. Code, Title 28, Section 1307*, (App. 23).

The frozen fruit, delivered and paid for, was accepted without inspection. The sight drafts remained in the American Security & Trust Company, Lerman's bank, from July 10th to July 28th, Lerman promising frequently to pick them up and accept the goods. No request for inspection was made until August 6th, when the market had dropped. As held by Judge Letts, in his oral opinion (J. A. 140), this refusal to accept the produce was not within a reasonable time and his request for inspection was not made within a reasonable time, and, after hearing Lerman testify, said "that the claim of the right to inspect was not made by Lerman in good faith and, in fact, is an afterthought."

In any event, the memoranda of sale did not provide for inspection, which could not be effectively made after the goods were in containers and frozen. When there is a confirmation of sale by the broker and inspection is desired, it is always stated in the order (J. A. 116).

The Uniform Sales Act, *D. C. Code, Title 28, Section 1307*, sub-section 47(3), provides that in the absence of an agreement where goods are delivered upon the terms that they shall not be delivered to the buyer until he has paid the price, the buyer is not entitled to examine the goods. (App. 23)

The Perishable Agricultural Commodities Act, 7 U. S. C. 499(b) and 499(g); *D. C. Code, Title 28, Section 1104, Statute of Frauds; D. C. Code, Title 28, Section 1307; and Regulations for the Enforcement of the Act* are printed as an Appendix hereto.

ARGUMENT**I****This Court Will Not Disturb the Findings of Fact Made by the Secretary of Agriculture and the Court Below**

It is well settled, of course, that the Trial Court as the trier of facts is in the best position to consider the demeanor of witnesses and to weigh their testimony, and his findings of fact shall not be set aside unless clearly erroneous. The latest case to reaffirm this principle is *Morfessis v. Morfessis*, decided August 28, 1950, No. 10249. For the greater reason the trial court's findings of fact affirming the findings made by the Secretary of Agriculture, if not conclusive, at least will not be disturbed unless they are against the manifest weight of the testimony. *Colby v. Riggs National Bank*, 67 App. D. C., 259, 273; 92 F (2) 183.

It can hardly be said in this case that there is any disputed testimony. The appellant put on the witness stand the manager of Fruit Processors, the broker who prepared and executed the memoranda of sales, and the salesman who made the agreement of sale, afterwards confirmed by the memoranda of sales. These witnesses testified clearly and positively to sustain the validity of the contract, its performance by delivery and the damages resulting from the breach. Lerman's testimony cast not the slightest doubt upon the case for the appellee. Therefore, the findings of fact made by the Secretary of Agriculture, who was entrusted by Congress with authority to investigate the transaction and to give judgment for any damages suffered by reason of the conduct of Lerman, when concurred in after full hearing by the United States District Court on appeal, will not be disturbed.

It may be pointed out again that the Act of Congress makes the findings of the Secretary of Agriculture prima-facie evidence of the facts therein stated. The burden,

therefore, was on the appellant to destroy this prima-facie evidence and if he attempted to carry such a burden, it was wholly ineffective.

This case might be analogous to the findings of fact by a referee on which judgment was entered in the court below, which findings are conclusive on a writ of error. *Roberts v. Benjamin*, 124 U. S. 64.

II

The Contract of Sale Made by the Joint Broker for the Buyer and Seller, Who Signed Memoranda of Sales in Triplicate, is a Valid and Enforceable Contract

While Lerman relied upon the statute of frauds in the petition for review and in the pre-trial proceedings, he seemingly has abandoned this position in the argument in this case, and contents himself with saying:

“Appellee obtained its award by false allegations with respect to the alleged contract and deliveries and by concealing appellants’ request for inspection from the Secretary.” (Appellants’ Brief, p. 12).

This statement is utterly without foundation. In fact, it is flatly contradicted by the testimony of Lerman himself, who said that when he was notified that the drafts had been received by the bank from Fruit Processors, he asked the Department of Agriculture for an inspection. The following colloquy occurred, (J. A. 125):

“Q When you were notified by this bank that drafts had been received by them from Fruit Processors, Inc., relating to the 2 and 1-pound packages, what did you do, Mr. Lerman? A I asked for an inspection.

“Q And to whom did you make that request? A I wired to the Department of Agriculture in Chicago.

“Q And was that the Federal Inspection Service you wired to? A Yes.

“Q Then what happened? A Then I received

a wire that they wouldn't permit them to inspect the merchandise."

It thus appears that the Department of Agriculture was advised by Lerman that he had demanded an inspection.

The further statement is made in Appellants' Brief, p. 14:

"Appellee secured its award by alleging a contract and deliveries it never made."

It should be sufficient in answer to this allegation to say that the findings of the Secretary and of the court below are specific and conclusive that there was a contract and deliveries were made, (J. A. 41). However, the appellant neither pleaded, attempted to prove nor proved false allegations. The statement (Appellants' Brief, p. 15) that the raspberries were "accepted and paid for" under a separate contract is false. The testimony is that all of the frozen fruits, both cherries and raspberries, were bought as a unit on the same day, July 5th, and were confirmed by the broker in writing on July 5th and July 11th, in four memoranda of sales covered by three exhibits, (J. A. 87-100). In any event, Lerman admitted being notified of the packaging and shipment of these fruits to the cold storage plant, some as early as July 10th, and from that time to July 25th, and made no complaint, but made promises time and again to pay the drafts and accept the merchandise. If, however, appellant's assertion now that no contract was made can be said to involve the statute of frauds, it is respectfully submitted that this statute, (App. 23), does not apply for the following reasons:

1. The memorandum of sale was in writing and signed by the joint brokers acting for both parties.

2. The buyer received, accepted and paid for one shipment of frozen raspberries and one shipment of frozen cherries under the terms of this contract.

3. The seller is a packer and packed the goods sold specially for the buyer, putting them in containers furnished by the buyer and stamped with imprints from a rubber stamp supplied by the buyer with the buyer's brand, "Frostee," and the buyer's name, Lerman Bros., Distributors, Wash., D. C. Special packing for the buyer and identifying these goods as the buyer's made them unsalable to the general trade in the ordinary course of the seller's business.

4. The buyer, by furnishing containers for packing the fruit, and a rubber stamp to be placed on each package with the buyer's brand and name thereon, expressed by words and conduct the buyer's assent to becoming the owner of the goods. In addition, the buyer frequently promised to pay the sight drafts drawn upon him through the American Security & Trust Company, Washington, D. C., after the delivery of these goods F. O. B. according to the contract, which is an express assent to becoming the owner of the goods.

Joint Broker

Dietrich, at the special request of the buyer, sought to purchase these frozen foods from the seller, and was, therefore, the joint broker for the parties. The contract was made on his usual memorandum of sale and purchase, and copies were sent each to the seller and buyer, and a copy retained by the broker. All this was in exact compliance with the Secretary's Regulations, (App. 26). Under this contract and memoranda of sales, the buyer accepted and paid for two shipments.

As to the assertion that the Secretary's award was secured by alleging a contract and deliveries never made, the court below said in his opinion, (J. A. 139):

"The Court specifically finds that the contract claimed by Fruit Processors has been proved and is binding upon Lerman.

"The transaction is not within the statute of frauds.

"The Dietrich Company was the joint broker for Lerman and for Fruit Processors. The memorandum of sale was in writing and signed by the joint brokers acting for both parties.

"Lerman received, accepted and paid for one shipment of frozen raspberries and one shipment of frozen cherries under the terms of the contract. There was a partial performance by the Fruit Processors and acceptance by Lerman.

"The goods were frozen especially for the use of Lerman. They were stamped with Lerman's brand and name with the stamp provided by Lerman for that purpose. This stamping, if nothing else, made the goods unsuitable for use of the trade except by Lerman in his trade."

If further authority is needed to support the proposition that this transaction complies with the statute of frauds in that there was a signed memoranda by the joint broker, we cite 8 *Am. Jur.*, Section 52; *Austin N. & Company v. Lingo*, 136 Md. 183; 110 At. 509, and *Rose City Bottling Works v. Godchaux Sugars*, 151 Ark. 269; 236 S. W. 825.

Lerman Was Not Entitled to Inspect the Fruit After It Was Packed and Frozen

The court below held that the demand for inspection was not in good faith and was an afterthought. This is fully supported by the evidence. The order did not provide for inspection. \$16,000.00 worth of frozen fruits were accepted without inspection. Lerman admitted that he knew drafts, dated July 10th, July 12th and July 25th, 1946, were in the American Security & Trust Company; that these drafts stayed therefrom July 10th until he got a telegram from Fruit Processors August 7th, saying that they would recall the drafts on August 8th unless they were paid. On August 7th, he received a reply from Fruit Processors that he could not have an inspection, (J.

A. 129-130. Under this evidence, Judge Letts, in his opinion, (J. A. 140) said:

"Lerman claims that he had the right of inspection before making payment. If he had such right it was not by virtue of the contract, but wholly because of the Secretary's Regulation 26.24(i).

"If, as claimed by Lerman, he had the right of inspection, the right existed for a reasonable time only after notice of arrival of the goods at the point of destination.

"At this point I call attention to the Secretary's Regulation 46.2(q) and (r). (q) reads:

"'Rejection without reasonable cause' means the act of any person who had purchased or offered to handle on consignment or otherwise for or on behalf of another produce in cars (1) of refusing or failing to accept such produce within a reasonable time or (2)", and so on.

"(r) defines reasonable time. It reads:

'Reasonable time as used in Paragraph (q) of this section means with respect to rail shipments not to exceed 24 hours after receipt of notice of arrival of the produce.'

"Now, I understand this shipment was by car.

"MR. BEACH: Car.

"THE COURT: The regulation goes on:

'With respect to truck shipments, not to exceed 6 hours after receipt of notice of arrival of the produce.'

"Then, I call attention also to Subsection (s) under that regulation:

'Acceptance includes any action by a purchaser which is inconsistent with the rejection of produce.'

"The Court finds that Lerman rejected the shipment without reasonable cause in refusing to accept the produce within a reasonable time, and in any event in neglecting to make his request for inspection within a reasonable time after notice of arrival of the produce at the destination.

"The Court holds that the claim of the right to inspect was not made by Lerman in good faith and is, in fact, an afterthought."

The terms of the sale were net cash, sight draft, with warehouse transfer order attached through the American Security & Trust Company, Washington, D. C., the appellant's bank. The Uniform Sales Act, *D. C. Code, Title 28, Section 1307(3)*, (App. 24), provides where goods are delivered to a carrier by the seller in accordance with an order from and agreement with the buyer upon the terms that they shall not be delivered until the buyer has paid the price, the buyer is not entitled to examine the goods before the payment of the price in the absence of an agreement permitting such examination. The principle of the Uniform Sales Act would seem to apply, because inspection could not possibly be consistent with payment prior to delivery.

The following authorities are in point:

In *46 Am. Jur., Section 249, p. 430*, the general law is stated as follows:

"However, where the buyer agrees to pay before delivery, his obligation to pay is not conditioned upon a prior opportunity to examine the goods. The Uniform Sales Act provided that 'where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words 'collect on delivery' or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.' Thus, by agreeing to pay cash for goods shipped on production of the delivery order, the buyer effectively waives any right to examine the goods themselves, and waives the provisions of the statute, including the right to inspect created thereby. Also, where the contract provides that payment is to be made upon delivery of the shipping documents, the seller has a right to demand payment on such delivery although the buyer has had no opportunity to inspect the goods."

The following authorities sustain the rule as laid down in American Jurisprudence:

Upon contract to deliver goods without any condition, the buyer has no right to insist upon inspection before paying a draft. The demand to inspect amounts to a refusal to abide by his contract. *Cochran v. Chelopa M. & E. Co.*, 88 Ark. 343; 114 S. W. 711.

By agreeing to pay cash for goods shipped on production of delivery order, buyer effectively waives any right to examine the goods themselves and waives the provisions of the law, including the right to inspect created thereby. *Brown v. Haritan Chemical Works*, 188 App. Div. 578; 177 N. Y. Supp. 309.

Agreement to pay cash is inconsistent with right of inspection at point of destination. *Lowder & Sons v. Albert Mackie Grocery Co.*, 97 Md. 1, 54 Atl. 634; 62 L. R. A. 795.

Contract to purchase car load of potatoes to be shipped for a certain price with sight draft attached to bill of lading held to be waiver of right of inspection, and buyer liable for breach of contract. *Whitney v. McLean*, 4 App. Div. 449; 38 N. Y. Supp. 793.

Right of inspection waived by provision for payment of sight draft. *Plumb v. Hallauer & Sons* (1911), 145 App. Div. 20, 130 N. Y. Supp. 147.

Buyer not entitled to examine goods where term of sale provides for payment before delivery. *Pierson v. Crooks*, 115 N. Y. 539; 22 N. E. 349.

Mitigation of Damages

Since the Secretary of Agriculture and the court below gave judgment for the difference between the contract price of the goods sold and delivered F. O. B. and the amount recovered on the resale "to save everything the

seller could from the wreck," it follows that both tribunals below found as a fact that the seller acted in a reasonable manner to mitigate the loss. No evidence to the contrary was submitted. Lerman was put squarely upon notice August 8, 1946, that the unaccepted one and two-pound packages would be sold at his risk and cost (J. A. 149), and again on January 30, 1947, was given an opportunity to accept the merchandise under the original order (J. A. 38). Many efforts were made to dispose of these packages, (J. A. 79). In the absence of any evidence to the contrary, Lerman cannot now complain of the efforts made to reduce the loss.

CONCLUSION

The judgment of the court below is plainly right, and should be affirmed.

Respectfully submitted,

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APPENDIX**W. J. A. DIETRICH CO.****Dried and Frozen Foods****Tower Bldg., Baltimore St. & Guilford Ave.****For Account Of: FRUIT PROCESSORS INC.****Terms: S/D thru: American Security & Trust Co.****7th and E St., S. W.****Washington 4, D. C.**

Sold To: Lerman Brothers
4th St. & Va. Ave.,
Washington 4, D. C.

Remarks:**F. O. B. Michigan****No. 113****Date: 7/5/46**

<i>Quantity</i>	<i>Size</i>	<i>Brand and Commodity</i>	<i>Price</i>	<i>Per</i>
1500 Cans	30#	RSP Montmorency	22½¢	lb.

Cherries 5x1**SALES MEMORANDUM**

Subject to confirmation of seller, This memo becomes
void when sale is covered by contract.

If incorrect advise immediately.

W. J. A. DIETRICH COMPANY**Per. R. Miller****COPY****EXHIBIT - 1****page 2**

Perishable Agricultural Commodities Act, 7 U. S. C.
499(b)

"§ 499b. Unfair conduct; what constitutes

**"It shall be unlawful in or in connection with any
transaction in interstate or foreign commerce—**

"(1) • • •

"(2) For any dealer to reject or fail to deliver

in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;"

499(g) Reparation Order—1949 Supplement (p. 67):

"§ 499g. Reparation order

* * *

Appeal from reparation order; proceedings

"(c) Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: Provided, That in cases handled without a hearing in accordance with paragraphs (c) and (d) of section 499f of this title or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. Such appeal shall be perfected by the filing of a notice thereof together with a petition in duplicate which shall recite prior proceedings before the Secretary, and shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed, with the clerk of said court with proof of service thereof upon the adverse party, together with a bond in double the amount of the reparation award conditioned upon the payment of the judgment entered by the court plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify, and file in said court a true copy of the Secretary's decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated."

D. C. Code, Title 28, Section 1104:

“§ 28-1104 (11:64). Statute of Frauds.

“(1) A contract to sell or a sale of any goods or choses in action of the value of \$500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

“(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

“(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.”

D. C. Code, Title 28, Section 1307:

“§ 28-1307 (11:107). Right of buyer to examine the goods—Exception—Authorized delivery to carrier.

“(1) Where goods are delivered to the buyer which he has not previously examined, his is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

“(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of

ascertaining whether they are in conformity with the contract.

“(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words ‘collect on delivery,’ or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.”

United States Department of Agriculture

WAR FOOD ADMINISTRATION

*Regulations for the Enforcement of the
Perishable Agricultural Commodities
Act, 1930, as Amended*

“46.2 Definitions. * * *

“(q) ‘Reject without reasonable cause’ means the act of any person, who has purchased or offered to handle on consignment or otherwise, for or on behalf of another, produce in commerce, (1) of refusing or failing to accept such produce within a reasonable time, or (2) of advising the seller or shipper or his agent that such produce will not be received in accordance with the contract or offer or (3) of indicating an intention not to accept such produce through an act or failure to act inconsistent with the contract;

“(r) ‘Reasonable time,’ as used in paragraph (q) of this section, means, with respect to rail shipments, not to exceed 24 hours after receipt of notice of arrival of the produce; with respect to truck shipments, not to exceed 6 hours after receipt of notice of arrival of the produce; and with respect to boat shipments, not to exceed 24 hours after the produce is unloaded and made accessible for inspection, unless the purchaser applies for Federal inspection of the produce within such period, or unless at the time of the receipt by the purchaser of notice of arrival of the produce the temperature is sufficiently below

freezing to render a complete inspection of the produce dangerous thereto, commodity and existing weather considered. * * *"

Departmental Interpretations of the Act

Contracts of Sale

"It is important that the essential terms of sale be stated in writing in order to meet the requirements of the statute of frauds. This may be done (a) by a confirmation of sale signed by the purchaser and by the vendor or his authorized agent, usually a broker, or by a memorandum of sale signed only by the broker or other authorized agent on behalf of the purchaser, (b) by correspondence which identifies the produce and states the terms of sales, or (c) by telegrams provided the produce is identified and the essential terms of sale are covered. Unless the terms of sale are fully stated in writing, aggrieved parties may find that they not only are not in a position to avail themselves of the benefits of this act in obtaining reparation but that they have left the Administration without the necessary evidence to bring successful disciplinary action against the offender.

"The original seventeenth section of the statute of frauds, which is the law in most States, generally as part of the Uniform Sales Act, also provides that such statute may be complied with where 'the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment.' As the written contract is usually more susceptible to proof than the other provisions above quoted, it is desirable to have a signed contract.

"In order to make an enforceable contract it is important that there be a 'meeting of the minds,' that is, that both parties agree to exactly the same specifications describing the commodity and the same terms of sale. It is also important that descriptive terms be used which have definite generally understood meanings. The use of indefinite terms such as 'beautiful,' 'good color,' 'good quality,' 'best,' etc., is unsatisfactory since there are no standards for the determination of their meaning. The seller is in-

clined to undervalue and the buyer to overvalue the meaning of such words.

"Brokers and those who deal through them should remember when filing complaints alleging rejection of a commodity or repudiation of a contract that the Administration will refuse to entertain the complaint unless the complainant produces evidence that a valid enforceable agreement was made between the parties. In most transactions the broker acts as the agent of both buyer and seller. As indicated above, it is customary in the trade to use one of two types of so-called 'confirmation.' One of these is called 'standard confirmation of sale' and is signed by the buyer and by the broker as agent of the seller. When so signed this becomes the actual contract between the parties. The other type is the 'broker's standard memorandum of sale' and is signed by the broker as agent for both the parties. When so signed it becomes valid evidence of the terms of the contract unless immediate objection is made to it by one of the parties. A standard confirmation of sale if signed only by the broker has the same force and effect as a broker's standard memorandum of sale. No matter which type is used it should be prepared in triplicate, one copy going to the buyer, one to the seller, and one being retained by the broker. If the broker issues neither of these papers and has nothing in writing signed by the buyer he should notify the seller that he has only a verbal agreement with the buyer. Furthermore, a broker should not issue either a confirmation or a memorandum of sale until the seller has advised him of his agreement to the exact terms agreed to by the buyer. Statements by the broker indicating that a sale has been made when in fact no enforceable contract has been entered into will subject the broker to a complaint alleging false and misleading statements in violation of the act.

"If produce is sold 'f. o. b. shipping point' and there is no express understanding between the parties to the contrary, title passes at the point of shipment. If the shipper is able to show that he loaded and shipped produce which complied with the contract and which was in suitable shipping condition, he is entitled to receive the purchase price."

No. 10,737

REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY LERMAN, MYER LERMAN and SAMUEL LERMAN,
Co-partners trading as LERMAN BROTHERS,
Appellants,

VS.

FRUIT PROCESSORS, INC., a corporation,
Appellee.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 22 1950

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**Appeal from the United States District Court
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REPLY BRIEF FOR APPELLANTS

Appellee's brief wrongly assumes (p. 6) that the Exhibit 1 attached to Fruit Processors' complaint before the Secretary (App. 13) is a true copy of the sales memorandum on which the award rests. This exhibit is a false copy of the original memorandum and is only in the record because the statute granting review specifies that the pleadings on which the Secretary's award was made shall be the pleadings at the trial de novo in the District Court.

The exhibit relied upon by the appellee was alleged in paragraph 4 of the complaint to be "the original purchase order" (App. 6), but was actually a fabrication intended to support the false allegation in paragraph 4 that the one and two-pound raspberries were to be shipped to a Chicago warehouse and that there was an agreed price of forty cents a pound for the one-pound raspberries (App. 6) instead of a sale "S. A. P.", that is, price subject to buyer's approval. Thus, this exhibit (App. 13) falsely shows the order for raspberries in thirty-pound tins, which was "F. O. B. Chicago warehouse" (App. 143) as appearing on the sales memorandum which confirmed the order for raspberries in one and two-pound boxes, which was "F. O. B. Michigan" (App. 142). This exhibit also shows the figure "40¢" after the initials "S. A. P.", although there is no figure after the initials "S. A. P." on the original memorandum (App. 142).

Elder, who swore before the Secretary that Exhibit 1 (App. 13) was "the original purchase order" (App. 6), admitted at the trial that the broker's sales memorandum, marked Lerman's Exhibit 1 (App. 142), was "the only written document covering the one and two-pound raspberries that was ever made out" (App. 81-82). When appellants' counsel tried to secure a further admission from Elder that "no paper ever existed", which would support paragraph 4 of his complaint (App. 6), his counsel objected to the question as immaterial and was sustained (App. 83). The apparent basis for the ruling was that Elder had already admitted this fact. At the pre-trial hearing the parties had stipulated "that there is no written agreement in this case, except the broker's memorandum, already introduced in the record before the Secretary" (App. 49), and Elder had already identified Lerman's Exhibit 1 (App. 142) as a correct copy of that memorandum (App. 64). After the broker, Dietrich, described it as containing the terms telephoned in by his

salesman, Beasley (App. 107), it was received in evidence without objection (App. 108). It is the only evidence as to the terms of Lerman Brothers' order for the raspberries in one and two-pound boxes.

The progressive distortion of the terms in the original memorandum by the false copy and the false complaint is shown in the following table of discrepancies between the original memorandum, the false copy and the allegations of the complaint. We have also shown the findings of the Secretary and the District Court which parallel these false allegations:

	<i>The Sales Memorandum (App. 142)</i>	<i>The False Copy (App. 13)</i>	<i>The False Allegation (App. 6)</i>	<i>The Erroneous Finding (App. 50)</i>
PRICE				
(1 lb. boxes)	S. A. P.	S. A. P. 40¢	\$0.40 per pound	\$0.40 per pound
(2 lb. boxes)	\$0.40 per pound	\$0.40 per pound	\$0.39 per pound	\$0.39 per pound
SHIPPING TERMS	F. O. B. Michigan	F.O.B.Michigan*	F. O. B. Chicago, delivery to Swift Warehouse	F. O. B. Chicago, delivery to Swift Warehouse
PAYMENT TERMS	Sight Draft	Sight Draft	Net Cash, Sight Draft with ware- house transfer order attached	Net Cash, Sight Draft with ware- house transfer order attached

The memorandum received at the trial (App. 142) shows on its face that Lerman Brothers did not agree to pay for any merchandise upon presentation of a Chicago warehouse transfer order. They agreed to pay for two carloads of raspberries by a sight draft to be drawn on their Washington bank after the merchandise was placed on board cars in Michigan for shipment to them at Washington, D. C. None of the three unpaid sight drafts on which the award rests were authorized by the terms of sale.

As we pointed out in our main brief (p. 19-20), the term F. O. B. in a sales contract guarantees the buyer a

* The false copy also shows the words "FOB Chicago" under the words "30# Tins Frozen Red Raspberries."

right to inspect the merchandise at its destination before he pays for it to see whether it is what he ordered. The fact that payment is to be by sight draft does not alter his right of inspection. He gets the right to inspect because the sale contemplates delivery of the merchandise as a condition of payment.

The statutory violation charged against Lerman Brothers is that they rejected, without reasonable cause, a "perishable agricultural commodity" that they had contracted to buy. The proof showed that they rejected sight drafts and warehouse transfer orders for merchandise in cold storage which the seller would not let them see.

The basic right to receive and look at what they bought before they paid for it was guaranteed to Lerman Brothers by the written terms of the sale. It was denied below only because the Secretary and the District Court based their findings upon what the appellee falsely alleged those terms were instead of what the evidence showed them to be.

Respectfully submitted,

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PETITION FOR REHEARING

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA, ~~Circuit~~ *United States Court of Appeals*
For the
District of Columbia Circuit

No. 10,737 FILED JUL 12 1961

Joseph W. Stewart

HARRY LERMAN, MEYER LERMAN AND SAMUEL LERMAN, Co-
partners trading as LERMAN BROTHERS, *Appellants*,

vs.

FRUIT PROCESSORS, INC., a Corporation, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HARRY LERMAN, MEYER LERMAN AND SAMUEL LERMAN, Co-
partners trading as LERMAN BROTHERS, *Appellants*,

vs.

FRUIT PROCESSORS, INC., a Corporation, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

PETITION FOR REHEARING

This Court's opinion, by affirming the reparation award upon grounds not considered by the Secretary of Agriculture or the District Court, has raised important questions which the parties have heretofore had no occasion to discuss. The purpose of this petition is to present appellants' views with respect to those questions. Those views may be summarized as follows:

1. The opinion erroneously assumes that this Court may sustain a penalty imposed for an alleged unreasonable rejection of merchandise in violation of the Perishable Agricultural Commodities Act upon finding a contract and breach thereof which were not charged or found below.

2. This Court's findings that the price and delivery terms incorporated in the written sales memorandum were modified by the appellants' conduct subsequent to its issuance are contrary to the evidence.

3. This Court's finding that warehouse receipts were tendered to appellants is contrary to the evidence.

4. This Court's finding that the market broke before appellants requested inspection is contrary to the evidence and the publicly recorded facts.

5. The foregoing factual errors in the opinion have resulted in a construction of Section 2(2) of the Perishable Agricultural Commodities Act by this Court which is contrary to the established administrative practice in enforcing that act.

6. If this Court believes that there is statutory authority for consideration of issues not litigated below, due process requires that the case be remanded to the agency charged with primary enforcement responsibility.

Appellants are indebted to this Court for the careful analysis of the sales memoranda in its opinion, which now forecloses any claim that the findings below as to the terms of the written contract for the one and two-pound boxes are supported by evidence. We do not question this Court's finding that the sales memorandum dated July 5, 1946, Lerman's Exhibit 1, established a valid written contract for 36,000 pounds of two-pound boxes at forty cents a pound and a like quantity of one-pound boxes, "S.A.P.",¹ price subject to buyer's approval, all "F.O.B. Michigan" (p. 6). We agree that "S.A.P." contemplated a reasonable price consistent with the quality of the pack and the prevailing market and assume that forty cents a pound was such a price for frozen raspberries of marketable quality, when so packed at that delivery point. We think it is equally clear that when, instead of placing these quantities of such

¹ In setting out Lerman's Exhibit 1 the opinion has inadvertently added the figure "40c" after "S.A.P." (App. 142).

merchandise on board two cars bound for Washington, D. C., as the contract required, Fruit Processors tendered sight drafts for different quantities stored at the Swift warehouse in Chicago for Fruit Processors' own account and convenience, Lerman Brothers could not violate the Perishable Agricultural Commodities Act by rejecting those drafts, or by promising to pay them and requesting an inspection of the stored merchandise. No such charge was made or tried below because neither the Secretary nor any Court which has reviewed a reparation award had ever so construed the statute.

I. Due Process Requires That No Administrative Penalty Be Sustained Without Strict Compliance With the Hearing Requirements of the Statute Imposing It.

We respectfully submit that this Court's opinion has overlooked the penal provisions of the governing statute. The opinion assumes that the award below involved only a matter of contract liability and could, therefore, be affirmed upon grounds different than those on which the Secretary and trial Court rested their decision. This assumption overlooks the fact that jurisdiction to make the award derives solely from a charge and finding by the Secretary of Agriculture that appellants violated a statute. The resulting award included not only money damages but a penalty in the form of attorneys' fees and it is enforceable by revocation of appellants' license to do business. In addition to these civil penalties, appellants are made liable to criminal prosecution at the discretion of the Secretary, by Section 12 of the Act, 7 U. S. C., 499(1).

The Secretary was authorized to impose these penalties only upon a finding by him that appellants had committed a federal offense by rejecting "without reasonable cause" a perishable agricultural commodity which had been delivered "in accordance with the terms of the contract". Section 2(2), 7 U. S. C., 499(b). Fruit Processors was obviously aware of this jurisdictional requirement when it

alleged an agreement for the delivery of the merchandise in question at a place and price specified in the written contract (App. 6); that the merchandise had actually been delivered to appellants at a destination designated by them (App. 8); and that appellants then refused to accept and pay for it (App. 8).

There was no claim below that the terms of the written contract as to price or delivery point were modified by appellants' conduct. Due process of law entitled appellants to notice of such claims and an opportunity to meet them before a valid judgment could be entered. *Morgan vs. United States*, 304 U. S. 1, 18.² Appellants' statute of frauds defense was properly eliminated by the trial Court only because Fruit Processors elected to rest its case upon the erroneous complaint and finding below that all of the contract terms were in writing (App. 40, 59).³ Yet this Court has now found: (1) that the price for the one-pound boxes was established by appellants' promising to pay the July 25th sight draft (p. 6), (2) that appellants waived their right to delivery of the quantities specified in the written contract, F.O.B. Michign, by requesting an inspection at Chicago (pp. 7-8), and (3) that a tender of delivery was made by tendering warehouse receipts (p. 8), although no such promise, waiver, or delivery was alleged or found below.

The issues at the trial *de novo* in the District Court were, by Section 2(c) of the Act (7 U. S. C. 499g), made the same

² "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." 304 U. S. 1, 18.

³ The Department's Service and Regulatory Announcements No. 121, issued in May, 1943 to guide complainants under this Act, makes the following statement under the heading, Contracts of Sale, on page 21: "It is important that the essential terms of sale be stated in writing in order to meet the requirements of the statute of frauds. This may be done (a) by a confirmation of sale signed by the purchaser and by the vendor or his authorized agent, usually a broker, or by a memorandum of sale signed only by the broker or other authorized agent on behalf of the purchaser, (b) by correspondence which identifies the produce and states the terms of sales, or (c) by telegrams provided the produce is identified and the essential terms of sale are covered." There were no correspondence or telegrams in this case which met the requirements of (b) or (c) and Fruit Processors was compelled to rely upon the terms of the broker's memorandum in order to state a case.

as those raised by the pleadings before the Secretary. While the statute permits the trial Court to allow amendments to the pleadings, as this Court's opinion points out (p. 2), none was made and the trial below was confined to the issues framed by the complaint before the Secretary and appellants' general denial.⁴ As noted above, that complaint charged that appellants made a written contract which specified a forty-cent price for the one-pound boxes on its face and which designated the Swift warehouse at Chicago as the delivery point. The Secretary so found and the District Court adopted those findings verbatim as the basis for its judgment (App. 50).

Having determined that the findings below as to the price and delivery terms of the written contract were contrary to the evidence, this Court should either have remanded the case for further consideration by the Secretary or directed the entry of a judgment for appellants.

The appellee rested its case below upon the findings made by the Secretary as to the terms of the written contract because it obviously felt that the *prima facie* effect of these erroneous findings had a greater tactical value than a claim that appellants had breached contract terms which were partly in a written contract and partly the product of subsequent conduct. Having persuaded the District Court to base its judgment on the erroneous findings of the Secretary, the appellee was estopped to make in this Court the argument in support of the judgment now embodied in this Court's opinion.⁵ The greatest benefit that the appellee may properly receive from this Court's conclusion that it might recover upon facts different from those relied upon below is an opportunity to amend its complaint and to then

⁴ Sec. 47.27 (c) of the Rules of Practice under the Act provides that the complaint shall state "the allegations of fact which constitute a basis for the proceeding and shall specify with particularity the matters or things in issue".

⁵ The general rule in this Court and other federal Courts is that there can be no affirmance on a ground not presented at the trial "unless it is made clear beyond doubt that this could not prejudice" the appellant. *Scott vs. Herrell*, 27 App. D. C. 395, 401; *Saunders vs. Shaw*, 244 U. S. 317; *Helis vs. Ward*, 308 U. S. 365, 370.

support that charge with evidence before a tribunal charged with primary enforcement responsibility.

II. This Court's Holding That the Statute May Be Violated by Refusing a Proposed Delivery Is Not Only Contrary to the Holding Below But Also Contradicts the Settled Administrative Practice of the Secretary.

A question of statutory construction not considered below is also raised by this Court's finding that appellants waived delivery of the merchandise at the point specified in the contract (pp. 7-8). Assuming that this Court correctly held that appellants' failure to reject the sight drafts more promptly and their request for an inspection at Chicago, created an obligation to accept a future delivery of the quantities specified in the drafts at the Chicago warehouse, Fruit Processors was not entitled to enforce that obligation by this award. Neither the Secretary nor any Court has ever found a violation of Section 2(2) by a refusal to accept a *proposed* delivery. No refusal has been found unreasonable unless preceded by a delivery of the merchandise itself or a document which would transfer legal title to the buyer upon payment of the price. Even where shipment has been made to the delivery point designated by the buyer, a refusal of the shipment is not a violation, absent a tender of the shipping documents. *M. C. Ragatz Company vs. Dallas Wholesale Grocer Company*, 5 Agriculture Decisions 472. So long as the seller retains control of the merchandise, he cannot sustain the kind of injury the statute was intended to prevent. *LeRoy Dyal Company vs. Allen*, 161 F. (2) 152, 156.

This Court's opinion incorrectly states that delivery was tendered by warehouse receipts (p. 7) which accompanied the drafts (p. 8). No such delivery was claimed or proven below. The warehouse receipts in evidence were issued to the appellee and were not negotiable (App. 24-29). As shown in our main brief (p. 4), the shipments evidenced by these receipts differ in date, number, and amount from the drafts (App. 35-36). Although Elder testified that ware-

house transfer orders accompanied the drafts (App. 70-71), Fruit Processors did not attach to its complaint, or otherwise offer in evidence, any of these transfer orders.⁶ The appellee relied below for proof of delivery upon alleged actual shipments to appellants at the warehouse on July 10, 12 and 25 (App. 8), and the Secretary's erroneous finding that such deliveries were in fact made (App. 41).

There was, admittedly, no delivery to appellants of a bill of lading, negotiable warehouse receipt, or any other document which would transfer title to the merchandise identified by the receipts in evidence upon payment of the drafts. The absence of due process implicit in any fact finding based upon issues originated by an appellate court is emphasized by the error noted above and other factual errors in the opinion. Had these errors been made below, we should have had an opportunity to correct them in our briefs instead of dealing with them for the first time in this petition.

III. There Is No Evidence to Support This Court's Finding That Appellants Approved the Forty-cent Price for the One-pound Boxes by Supplying Containers and a Brand Stamp or by Promising to Pay the July 25 Draft.

As this Court stated, the "S.A.P." contract for the one-pound boxes meant that the price was to be one suggested by the seller and approved by the buyer (p. 6). It could not be determined arbitrarily by either party. Appellants were plainly committed by the sales contract to take 36,000 one-pound boxes, F.O.B. Michign, at a reasonable price. It may also be assumed that the forty-cent price suggested by the seller was the market price at St. Joseph, Michigan, on the day the order was given. By sending the necessary one-pound boxes and labels to St. Joseph after the sales memorandum was received, appellants could at most sig-

⁶ A transfer order is not issued by the warehouse and does not acknowledge receipt of any merchandise. Such orders are a mere direction from the seller to the warehouse to release merchandise belonging to the seller (App. 30).

nify a willingness to take that quantity at that place at that price.

Without any prior authority of any kind from appellants, the appellee shipped 17,232 one-pound boxes to the Swift warehouse at Chicago, where they were received on July 16 and 17, 1946, and held for Fruit Processors' account (App. 28-29). The warehouse receipt for these shipments was not negotiable (App. 29) and was never tendered to appellants. They received no advice whatsoever as to these unauthorized shipments until July 28, when the July 25 sight draft and a warehouse transfer order for this amount were received by appellants' bank.

Appellants needed the raspberries in question to fill an order from one of their customers (App. 122) and would probably have taken the quantity offered at the warehouse if they could have had an inspection to determine the condition of the merchandise at the new delivery point. A reasonable price could then have been agreed upon after due allowance for the difference between the carload rate from St. Joseph to Washington, D. C., and the L. C. L. rate from Chicago. Appellants were not then bound to pay a forty-cent price without inspection simply because appellee chose to demand it, yet that is the effect of this Court's holding.

There was no evidence of any approval of a forty-cent price by a promise to pay a draft. The July 25 draft (App. 36) is the only draft for the one-pound boxes and the only one based upon a forty-cent price. Upon cross-examination by appellee's counsel, Dietrich, the broker, testified to a promise by Harry Lerman on July 23, 1946 to pay an unspecified draft "tomorrow" (App. 113). This obviously could not have been the July 25 draft as it had not then been issued. Upon re-direct examination, appellants' counsel asked what draft Dietrich did refer to and was told he couldn't tell (App. 119).

Upon cross-examination by appellants' counsel, Beasley, Dietrich's salesman, testified with respect to an unspecified draft that Lerman "said he would pick it up in a few days,

and that happens many times with customers, and usually you wait a few days" (App. 101). On re-direct examination, Beasley could not specify the time of any draft which Lerman was to pick up (App. 102).

Dietrich was later called by appellee to testify as to the condition of the raspberries in thirty-pound tins on arrival in Washington and also testified in response to a suggestion of appellee's counsel, that Lerman repeatedly promised to pay the drafts for the first and second shipments, which were for two-pound boxes, and that there was "no refusal of the raspberries between July 16 and July 23" (App. 138). On cross-examination, he said he didn't know when any of the drafts were received in Washington or sent from St. Joseph (App. 138-139).

Harry Lerman, on cross-examination, denied that he promised to pick up the drafts (App. 127). All of the evidence in the record as to any promise to pay any draft has been noted above. No testimony by any witness was directed to the July 25 draft and none of appellants' witnesses was questioned about any promise to pay any draft on his direct examination because the complaint charged only a refusal to pay them all. It alleged that the forty-cent price was expressly embodied in the written contract and upon such a complaint there could be no trial below of any alleged promise to pay the July 25 draft. There has been none here but even if there had been such a trial, this Court's finding may not stand on the evidence received.

IV. There Is No Evidence to Support This Court's Finding That Appellants Waived the Appellee's Departures from the Contract As to the Point of Delivery.

The complaint alleged that the written contract provided for delivery at the Chicago warehouse and the Secretary and the District Court erroneously so found (App. 50). Since no claim of waiver was made below, no evidence was offered to show a waiver. Such evidence is not supplied here by characterizing as "repudiation" (p. 7) appellants' refusal to accept delivery without inspection of the mer-

chandise, at a point not designated by them. The evidence with respect to the selection of the Chicago warehouse delivery point is as follows:

Both the one and two-pound boxes were sent to Chicago for Fruit Processors' own convenience by five truck shipments on July 9, 10, 11, 16 and 17 (App. 64-65) because appellee lacked cold storage facilities at St. Joseph (App. 68). Appellee was compelled to store at Chicago only because it did not pack the carload orders set forth in the sales memorandum, which if promptly completed in accordance with the terms of the sale would have been placed on board cars at St. Joseph, Michigan, for direct shipment to appellants at Washington, D. C. Appellants did not authorize any of these shipments to Chicago and were not notified of them until the July 10, 12 and 25 sight drafts were sent to Washington (App. 68). Since none of the shipments for which the drafts were issued was authorized by the contract, the appellants were not bound to take any action until they were advised when and how the appellee proposed to fill their order, which included both one and two-pound boxes (App. 142). As alleged in the complaint, appellants' order was for one carload of each and they were not bound to accept either without the other (App. 7). Appellants received no advice that any one-pound boxes had been packed until the July 25 draft arrived in Washington, which, as the opinion notes, was about July 28 (p. 8).

Dietrich admitted receipt of an oral request for inspection from Lerman Brothers "around the first of August" (App. 116, 139), which he told appellants they were not entitled to, but passed along to the appellee (App. 118).⁷ Appellants wired the Department of Agriculture on August 5 (App. 128) for an inspection and received a reply that they could not locate one lot and that the warehouse would not

⁷ The August 6 date in the opinion (p. 8) is apparently based upon Elder's testimony that Dietrich phoned the inspection request to him "on August 6 or thereabouts" (App. 78-79). The only evidence as to the date on which the request was first made by appellants is as stated above.

allow inspection until released by appellee (App. 145-146). On August 7, appellee confirmed its refusal to permit inspection in a telegram to appellants (App. 144).

There was not the slightest suggestion by the Court below, counsel, or any witness that appellants waived any rights they had under the contract of sale by asking to inspect the raspberries at the new delivery point. The finding below was that they had no right of inspection (App. 53). The F.O.B. contract, found by this Court, did give appellants a right of inspection, as we showed in our main brief (p. 20); but, in any event, the new delivery point was itself an independent basis for an inspection. No seller may truck frozen food from point to point for its own convenience and then tell the buyer that he may not determine the condition of such a perishable commodity before taking delivery. Fruit Processors had, itself, delayed eight days in notifying appellants that the one-pound boxes had been shipped to Chicago and had, thereby, made prompt inspection on arrival at the Chicago warehouse impossible by its own conduct. The real basis for this Court's erroneous conclusion that there was an unreasonable delay in the inspection request appears to be its mistaken conclusion that the request was not made until after the market broke (p. 9).

V. This Court's Finding That the Market for Frozen Raspberries Broke Before the Demand for Inspection Is Unsupported by the Evidence and is Contrary to the Public Record.

The complaint tendered no issue as to appellants' inspection request or as to the market price at the time of the request. No finding on this point was made below. The entire evidence in the record as to the market price is as follows:

Elder, Fruit Processors' General Manager, testified on direct examination that about August 10 or 11, 1946, when he first attempted to sell the rejected merchandise to others,

the market "was very much confused" (App. 73), that the price declined sometime subsequent to July, 1946 (App. 74) and that the price was still declining in January, 1947 (App. 75). On cross-examination by appellee's counsel, he testified that the market price had gone down by August 7, 1946 (App. 78-79). On redirect he testified that the first offers made after "taking back the papers", were at forty cents a pound (App. 80) and that thereafter he offered them at lower prices (App. 80).

Dietrich, the broker, said the decline started "around the middle of August of 1946" (App. 109), that the break was abrupt (App. 110), that prices in July and August, 1946 "ranged from possibly 38 to 40, 41 cents" (App. 110), that the packer's price as of the middle of August, 1946 was approximately 38 to 40 cents, as described in the magazine *Quick Frozen Foods* (App. 110-111),⁸ and the price was constantly declining after the middle of August, 1946 (App. 112).

There was no testimony or documentary evidence that the market price of the merchandise in question "broke" or declined before appellants made their inspection request, and this Court's finding that it did so (p. 9) is not only contrary to the evidence but is contrary to the publicly recorded facts as to price movements in the frozen food industry as well.

We respectfully submit that this Court has erroneously affirmed the award below and that a rehearing should be granted.

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⁸ Elder had also stated that the prices recorded in this magazine were "a fair estimate" of the prevailing market quotations (App. 74).

